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PA CONTROL NUMBER: PA 11-234 2 Mar 11 — SUSPENSE: 15 Apr 2011

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PUBLIC AFFAIRS: for Richard M. Cole (Chief, PA) — DATE: 3/28/11

1. TTLE: Law, Policy and Nonproliferation Project Events and Workshops — CONTRACT NUMBER

ORIGINATOR: Johnson, Philip; Bidwell, Chris

2. TYPE OF MATERIAL: ☒ PAPER ☒ PRESENTATION ☐ ABSTRACT ☐ OTHER

3. OVERALL CLASSIFICATION: ☒ CONTRACTOR UNCLASS ☒ PROJECT MANAGER UNCLASS

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4. MATERIAL TO BE: ☐ Presented ☐ Published Date Required:

Name of Conference or Journal:

Remarks: To be published on the ASCO website and distributed as needed

Law, Policy and Nonproliferation Project Events and Workshops

Key Themes, Results and Related Materials 2008 - 2009

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and
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Booz Allen Hamilton

April 2010

Defense Threat Reduction Agency
Advanced Systems and Concepts Office
Report Number ASCO 2010 040
Contract Number MIPR 09-2670M

The mission of the Defense Threat Reduction Agency (DTRA) is to safeguard America and its allies from weapons of mass destruction (chemical, biological, radiological, nuclear, and high explosives) by providing capabilities to reduce, eliminate, and counter the threat, and mitigate its effects.

The Advanced Systems and Concepts Office (ASCO) supports this mission by providing long-term rolling horizon perspectives to help DTRA leadership identify, plan, and persuasively communicate what is needed in the near term to achieve the longer-term goals inherent in the agency's mission. ASCO also emphasizes the identification, integration, and further development of leading strategic thinking and analysis on the most intractable problems related to combating weapons of mass destruction.

For further information on this project, or on ASCO's broader research program, please contact:

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LAW, POLICY AND NONPROLIFERATION PROJECT
EVENTS AND WORKSHOPS
KEY THEMES, RESULTS, AND RELATED MATERIALS 2008-2009

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SECTION ONE

INTRODUCTION

SECTION ONE: INTRODUCTION

The Law, Policy and Nonproliferation Project (LPNP) promotes research and scholarship, and develops communities of interest, at the intersection of international law, international security, and the nonproliferation and countering of weapons of mass destruction (CWMD). In so doing, the LPNP analyzes and promotes CWMD tools and policies that are rooted in national and international legal domains. The project is the first organized, sustained initiative to advance these issues.

In exploring the expanse of CWMD legal challenges and opportunities, the LPNP develops, analyzes and socializes a series of "stand alone" nonproliferation approaches and, concurrently, works to complement, enhance or refine existing CWMD lines of effort, particularly in four of the eight Military Mission Areas (MMAs) as defined by the National Military Strategy to Combat WMD: Offensive Operations, Interdiction Operations, Security Cooperation and Partner Activities, and Threat Reduction Cooperation.

Alignment of project work to the MMAs highlights that the LPNP lives in two worlds: experienced, informed, and professional scholarship, and the application of that scholarship and expertise to real-time, real-world proliferation problems.[1]

With respect to the former, the LPNP has produced, and continues to produce, unique analyses addressing what are commonly seen as distinct functional areas: the legal arena and combating WMD. It is the project perspective that these disciplines are highly complementary when viewed within a holistic schema. To date, the intellectual pursuit of that schema remains poorly integrated within academia and the US government.

Regarding the latter, and at the request of DTRA-ASCO, the PLNP is providing extensive legal guidance to the National Security Council and senior levels of government on a host of cross-cutting legal-nonproliferation questions, particularly on the Iran sanctions front. This goes

[1] These efforts will be addressed in a series of forthcoming reports and analyses.

directly to the PLNP proposition that this emerging approach is, operationally, weakly advantaged by states seeking new nonproliferation or counter-proliferation opportunities.

As an essential element of the work, LPNP plans, organizes and executes small workshops and events on specific topics of relevance and concern regarding legal issues and the CWMD mission. The intent of these efforts is three-fold: first, to highlight and assess relatively defined topics and to create informed discussion of those issues; second, to disseminate electronically, and in a timely fashion, the results of these events to any interested party, thereby increasing awareness and impact[2]; third, to serve as a socialization mechanism that draws together diverse expertise and communities of interest.

The following captures the results and other materials for seven such events, covering roughly the first phase of the project, 2008-2009. The effort is on-going, so additional workshops and programs will be included in future reports.

These events covered in this report are:

- ❑ PLNP Scoping Conference (September 2008)
- ❑ Legal Frameworks for US Cooperative Threat Reduction Efforts (October 2008)
- ❑ Resolution 1540: Did the Security Council Exceed its Authority? (November 2008)
- ❑ Preventive War: Do Weapons of Mass Destruction Change the Rules? (January 2009)
- ❑ Nuclear Energy in the Middle East: Clearing the Legal Hurdles (March 2009)
- ❑ Attribution: Post-Nuclear Event (April 2009)
- ❑ The Legal and Policy Implications of Ambiguous Rocket Launch: Learning from the North Korea Case (May 2009)

The main report is organized as follows: it first highlights the key themes from the various presentations and discussions, offering the reader the highest order critical thinking on the particular matter, along with a road map of issues and concerns that will remain relevant both on-

[2] Materials are posted on the project website, http://lsgs.georgetown.edu/programs/nlp/

and over-the-horizon. These key themes are infused with opinion from academia that informed the events. The subsequent section provides short abstracts or summaries of each event, to include key points of discussion.

A lengthy appendix to this report provides additional materials, to include agendas, attendees, rapporteur notes (where available), and presentation texts

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SECTION TWO

KEY THEMES

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SECTION 2: KEY THEMES

A. USE OF PREEMPTIVE/PREVENTIVE FORCE TO COMBAT WMD PROLIFERATION.

A review of scholarly literature and the opinions of panelists at several events have indicated that opinion regarding the legality of the use of force preventively to avert the proliferation of WMD remains divided.

1. STATE PRACTICE AND CUSTOMARY LAW: THE OSIRAK AND AL-KIBAR STRIKES

Those who support the legality of using preventive force claim that state practice—as a manifestation of emerging customary international law—supports the use of force even *before* the clear materialization of a national security threat to prevent nuclear proliferation. As evidence, proponents point to the lack of international objection to Israel's 2008 strike on the al-Kibar reactor in Syria compared to near universal condemnation of Israel's attack against Iraq's Osirak reactor in 1981.

2. CUSTOMARY INTERNATIONAL LAW AND THE UN CHARTER

It appears that that customary international law restrictions on the use of force in self-defense are changing. Typically, the 1837 *Caroline* case is upheld as embodying customary international law, later captured in the UN Charter's Article 51 recognition of states' "inherent right to self defense," pertaining to the use of force in self-defense. By the standards established in that case, force may only be used preemptively in self-defense in response to a clear, imminent, and overwhelming threat, leaving no moment for deliberation. Furthermore, the case requires that force used in self-defense be proportional to the threat to be averted.

Proponents of the legality of preventive use of force acknowledge that the proportionality principle remains in effect as a matter of international law. However, they argue that practical considerations, in light of the uniquely devastating WMD threat, render the requirement that states abstain from the use of force until a threat becomes *imminent* is obsolete. Instead, they propose that three use of force "tests": the magnitude of the threat to be avoided, the past history of aggression of a state seeking to develop nuclear weapons, or the threatening rhetoric of such a state. These tests would replace the "imminence" requirement.

Others reject this approach as not (yet) founded in state practice, and is excessively broad and ripe for abuse, as it may justify the use of force in a wide variety of situations contrary to the purposes of the UN Charter to limit the use of force and promote international peace and security.

3. POLICY CONSIDERATIONS

Whether or not a state has the legal right to use force preventively against nascent nuclear programs, there are practical considerations that might encourage a state to act with caution when considering a foreign policy based on the preventive use of force. Evidence about the activities of secret nuclear programs is often unclear. A state may face vocal international opposition—and punitive measures from the United Nations—when it exercises the use of force option against the imminent emergence of a nuclear weapon if, in fact, it is later demonstrated that the facilities targeted were designed for peaceful, or even ambiguous purposes.

B. THE PROLIFERATION SECURITY INITIATIVE (PSI)

The Proliferation Security Initiative is an innovative international activity aimed at facilitating international cooperation, information sharing and operations to intercept proliferation sensitive goods in transit. The initiative is based on a statement of commitment to nonproliferation principles, but does not include binding legal obligations.

1. INCREASING PARTICIPATION

The question of how to increase participation in PSI has been raised at several project events. Some have suggested that a Security Council Resolution, similar to 1540, could require states to facilitate the interdiction of proliferation sensitive cargo aboard ships flying their flag or in their territorial waters. However, with the lackluster implementation of Resolution 1540, and vocal disapproval of the Security Council's attempts to mandate state behavior as a "global legislature," this effectiveness of such an approach is questionable.

Another proposal would codify the general statement of participation principles of the PSI program, currently not legally binding, into a multilateral convention. Such an approach would make it a binding legal obligation for states parties to support PSI activities in any way they are able. This approach has been criticized, however, since states which are currently non-

participants or not fully active participants in the program are not likely to become parties to such a convention.

A more promising strategy appears to be making full participation in PSI a condition of contracts for peaceful nuclear energy cooperation, known in the United States as 1-2-3 agreements. For example, The United Arab Emirates' hesitancy to interdict cargo passing through the port of Dubai, a declared free trade zone, has proved a significant weakness in the PSI system. In current negotiations for a 1-2-3 agreement with the U.A.E., United States policymakers have stressed more active participation in PSI by the U.A.E.

2. LEGAL CHALLENGES TO INTERDICTION

Under international law, only a ship's flag state can authorize the boarding of a vessel, or in the case of a potential threat to the security of the vessel or its crew, the ship's master may authorize boarding to obtain assistance. Under this international legal framework, several ideas have been proposed for expanding states' ability to board vessels to interdict proliferation sensitive cargo and facilitate PSI activities.

a. Boarding Agreements

In order to allow operational flexibility, the United States has sought to obtain permanent standing boarding agreements from many states, including flag-of-convenience states, which would allow PSI partners to board ships flying under that flag when there is suspicion that proliferation sensitive goods are aboard. The project is researching how the United States can incentivize other states to enter into boarding agreements under the auspices of PSI.

b. Shipmaster Authority

A ships master's has the authority to authorize the boarding of his ship if he believes the vessel's or crew's safety is at risk. A survey of recent legal literature has revealed that many scholars believe that while unassembled component parts that could later be used to develop nuclear weapons do not pose an immediate threat to the safety of a transporting ship or its crew, chemical or biological weapons agents or a prepared nuclear or radiological device does. If any state or PSI authorities believe that proliferation sensitive goods that pose a potentially immediate danger are on board a vessel, they can obtain permission from the

shipmaster to board and remove the dangerous item. The project should explore the use of the shipmaster's authority as a way to expand the efficacy of PSI operations.

c. Preemptive Self-Defense

Some legal scholars have argued that the customary right to preemptive self-defense can be invoked to expand the legal authorities of PSI partners to interdict ships. If a state has reason to believe that a nuclear, radiological, chemical, or biological weapons is aboard a vessel, headed for its shores, where it will be used by terrorists to perpetrate an attack on the civilian population, the state may claim an imminent threat under the Caroline case and use force to respond. Under these circumstances, a state, and potentially its PSI partners, may forcibly board a vessel and confiscate the weapon. The use of preemptive self-defense as a legal basis of PSI interdiction operations should be further explored.

C. RESOLUTION 1540

1. LEGAL AUTHORITY OF THE SECURITY COUNCIL AS "WORLD LEGISLATURE"

While heralded as a great step forward in deterring WMD proliferation to terrorist organizations and other non-state actors, Security Council Resolution 1540 has raised important legal questions about the authority of the Security Council to impose domestic legal obligations on member states. The Resolution has been poorly implemented by UN member states, many of which claim the Security Council has no authority to require them to adopt domestic criminal statutes. A survey of legal literature and an expert panel discussion hosted by the project indicate legal scholars are divided about the extent of the Security Council's authority. Those who argue in favor of the Security Council's authority claim if was authorized by the charter to require member states to take whatever action is necessary to combat threats to international peace and security, including WMD proliferation. Opponents argue that the Security Council can only direct the conduct of member states' foreign affairs, engaging them for example in imposing economic sanctions or providing military forces for a UN peace enforcement mission.

Regardless of the Security Council's authority, the perceived illegitimacy of Security Council Resolutions that amount to global legislation has profound implications for nuclear proliferation policy. The Security Council cannot be used as a "shortcut" to avoid the international treaty negotiating process to fill gaps in the international legal regime in the field of WMD

proliferation *if* its resolutions are likely to be protested and not implemented by member states. The debate over Resolution 1540 highlights the need to continue to rely on codified treaties and customary law to influence state behavior.

2. MULTILATERAL CONVENTION CRIMINALIZING NUCLEAR TRAFFICKING

The lackluster response of many states in implementing the UNSCR1540 may well stem from the belief that the Council overstepped its legal authority and that compliance with its illegally-adopted resolution would imply state consent to an expanding role for the Security Council as a world legislature. In addition, some states believe the resolution should also reaffirm a commitment to disarmament on the part of nuclear weapons states, or have other disagreements with the wording of the resolution, which they were not fairly able to influence if they were not on the Security Council at the time the resolution was adopted.

One way to increase international cooperation in preventing the proliferation of WMD technology to non-state actors would be to embody to general goals of the Resolution in a multilateral convention criminalizing nuclear trafficking, the details of which will be described in the "Prosecuting Nuclear Smugglers" section below. In this way, all states could voice their opinions and develop a text that meets their particular concerns and is legally legitimate.

a. Model Statutes

Despite concerns over the extent of the Security Council's powers, there are practical obstacles that have prevented the full implementation of the resolution's provisions around the world. Many states have little experience with WMD trafficking and have never prosecuted nuclear technology smugglers. It is especially difficult for these states to develop effective domestic nonproliferation statutes. The experience of many EU nations and the United States with tracking and prosecuting nuclear smugglers has exposed many gaps in nonproliferation legislation and helped these countries draft more effective statutes. The lessons learned by these countries should be used to draft model nonproliferation statutes capable of dealing effectively with the threat of WMD trafficking, which nations with limited experience in this area can adapt and implement to fulfill their legal obligations under Resolution 1540.

The Project on Nonproliferation Policy and Law, together with the Stockholm International Peace Research Initiative (SIPRI) has been studying nonproliferation legislation and is planning an upcoming conference at Wilton Park in the United Kingdom to address the issue of prosecuting WMD traffickers. This research may help inform the drafting of model nonproliferation legislation.

Dr. Richard Cupitt, a panelist at the project's Resolution 1540 event, has mentioned that so far no model statutes have been proposed to passed on to states, although some states have requested such substantive legal assistance.

b. Training Customs Officials

In order for nonproliferation statutes to be effective, however, they must first be enforced. Therefore, in addition to helping states draft statutes, the international community should also help train national authorities how to detect violations of those statutes. The PSI program, as panelists at several other PNLP events have suggested, is ideally suited to this task, and EU nations and the United States already conduct joint training programs with customs and law enforcement officials in other nations under the auspices of PSI. These activities should be expanded and tailored to help states comply with Resolution 1540.

D. ATTRIBUTION AND LIABILITY

1. MECHANICS OF TRACING NUCLEAR "SIGNATURE" AFTER DETONATION

The PNLP's event on Nuclear Attribution explored the science behind identifying the source of fissile materials used in a nuclear detonation. The process involves identifying the radiological signature of fissile materials, which varies depending on whether uranium or plutonium serves as the basis of the nuclear fuel, and what enrichment processes were used. This depends on the gas centrifuge and cascade design, among a number of other factors.

In the September scoping meeting, however, it was revealed that tracing the origin of chemical and biological weapons agents can be much more difficult. It was proposed that, since most chemical and biological precursors are obtained legally from legitimate corporations, these suppliers should incorporate some sort of chemical or genetic "barcode" in their products, so

they can be traced back to the source and potentially identify the perpetrators of a chemical or biological attack.

2. THE STATE RESPONSIBILITY DOCTRINE AND LIABILITY FOR WMD ATTACKS

The principle of state responsibility for damage suffered in a second state that directly results from actions or negligence in the first state is well established in customary international law. The most frequently cited expression of this doctrine of state liability is the Trail Smelter Arbitration between the United States and Canada in 1931. However, the principle has been reaffirmed several times, most notably by the International Court of Justice in the Gabcikovo-Nagymaros Case in 1997.

Applying this doctrine to WMD attacks where a determination can successfully be made as to the source of fissile materials or chemical/biological precursors used in the attack, states could be conceivably held liable for attacks perpetrated in the territory of another state if the first state failed to implement international safeguards to prevent the diversion of proliferation sensitive materials. If a terrorist attack is carried out with improperly secured nuclear materials, the state that failed to secure those materials may be held liable under international law.

The possibility of being held liable for acts of WMD terrorism should serve as an incentive for states to become compliant with international materials safeguards and Resolution 1540. If states comply with all international regulations governing the safekeeping of WMD materials, they arguably become immune from liability for negligence.

This liability may similarly be extended to individual corporations.

E. PROSECUTING NUCLEAR SMUGGLERS

The Project on Nonproliferation Policy and Law has been tracking nuclear proliferation and dual-use goods export control prosecutions in the United States and abroad for the past year and has compiled a list of legal challenges that frequently emerge in such prosecutions and prevent nuclear traffickers from being brought to justice. An analysis of current and past prosecutions is included in the appendix to this report. An Article has also been written analyzing the legal challenges of these prosecutions and how they can be overcome in the future. The article has been submitted separately.

1. REVISING STATUTES

Nonproliferation and export control statutes need to be revised to provide penalties commensurate to the damage to international peace and security caused by individuals who repeatedly export proliferation sensitive goods to countries of proliferation concern. These crimes should not be treated simply as regulatory noncompliance for failure to obtain an export license or exporting restricted goods, as they often are, but as serious criminal offenses.

2. COURT JURISDICTION

Nuclear trafficking crimes pose significant challenges to court jurisdiction. The first of which becomes whether domestic laws can be made applicable to a national of the prosecuting state, whose criminal activities may have been conducted abroad. International Law provides states jurisdiction in such cases under the "active personality/nationality principle," however, this should be explicitly states in nuclear proliferation statutes to avoid legal challenges at trial. This approach has contributed to increased success, most notably in Germany.

Furthermore, statutes should include a provision determining which courts should have jurisdiction over the offenses, whether they be those at the point where an illegal export was made, where a contract conspiring to export restricted goods was made, or in the district of residence of the offender. Furthermore, these statutes should allow cases to be held in superior courts or courts, which have experience with proliferation and export control prosecutions to increase the likelihood that the prosecution succeeds.

Finally, statutes should allow for the use of intelligence reports as evidence and provide for their protection through in camera discovery if they are classified documents. Intelligence reports are often critical to contextualize the apparently harmless actions of those who export precision ball bearings to Iran, for example. An intelligence report will indicate how such components will be used to construct centrifuges for nuclear enrichment in a destination country.

3. EXTRADITION TREATIES

Extradition is often critical to obtain jurisdiction over offenders who have fled abroad or are conducting illicit activities in countries that are unwilling or unable to try them for their offenses. However, two legal obstacles have frequently frustrated extradition requests.

The first is the "double criminality" requirement, which mandates that the crime for which the requesting country seeks to prosecute an extradited individual be a criminal activity both in the requesting and extraditing states. If some states do not have proliferation statutes on the books, as many do not, they may effectively become safe havens for nuclear smugglers.

The second difficulty is the political crimes exception to extradition, a principle of customary international law, which prevents extradition of an individual for crimes of a political nature. Since many nuclear smugglers are motivated by political or religious ideologies, or are facing charges of treason for their crimes, extradition is often refused. The simple fix to this problem is to incorporate an exception in extradition treaties preventing the political crimes exception from being invoked in nuclear trafficking cases. Such an exception has recently been added to many standing extradition treaties to cover terrorist actions.

4. INFORMATION SHARING

Another major problem in nuclear smuggling cases is obtaining evidence of illicit activities conducted abroad. Governments should work together to transfer evidence and information across jurisdictional boundaries to facilitate the prosecution of nuclear smugglers. Recently the IAEA has acted as a transfer mechanism to provide evidence related to nuclear trafficking activities from the country where that activity occurred to the country prosecuting the individual responsible.

5. CIVIL PENALTIES

Finally, civil penalties should be explored in cases where criminal prosecutions are unsuccessful in putting nuclear traffickers behind bars. The following civil sanctions can often be imposed by governments on the grounds of significantly less evidence with fewer procedural obstacles than are involved in obtaining criminal convictions: Loss of Export Privileges; Asset Seizures; Fines.

6. CIVIL LITIGATION

In addition to criminal prosecutions, the project is exploring the use of civil litigation against nuclear traffickers and corporations and individuals that negligently supply proliferation sensitive goods to traffickers, rogue states, or terrorist organizations. An analysis of past civil

actions and consultations with civil litigators has highlighted the following potential causes of action to bring suit against nuclear traffickers and their suppliers:

a. Causes of Action

i. Actual Injury

In the case where real injuries have been caused by the use of nuclear, chemical, or biological weapons obtained through illicit supply networks, suits may be brought against suppliers and traffickers for material support to the commission of crimes against humanity. For example, suit has been brought recently in U.S. courts by Iraqi Kurds against American chemical companies who supplied precursor chemicals to Saddam Hussein's chemical/biological weapons development programs.

ii. Theft of Intellectual Property

Nuclear traffickers have supplied their clients, most notably North Korea, Iran, Syria, and Libya with more than the physical components needed to enrich uranium for nuclear weapons development. Gas centrifuge blueprints and other intellectual property have been sold to these states, and U.S. intelligence reports indicate al Qaeda may have purchased such blueprints as well. The engineering firms that developed these blueprints could potentially bring suit against those who diverted and sold blueprints for theft of intellectual property.

iii. Damage to Corporate Reputation

Some corporations have been exposed in the media as having contributed to the development of WMD through the sale of chemical or biological weapons precursors or nuclear technology. One U.S. chemical company based in Baltimore, MD, has been found to have provided precursors to Saddam Hussein's chemical weapons programs. Civil litigators believe this negative media attention may cause significant permanent damage to such companies' corporate reputations. These companies may have a right to sue traffickers who clandestinely diverted these materials and made such companies unwittingly complicit in a WMD development program.

iv. Extreme Mental Duress

One civil litigator experience in representing the families of victims of terrorist attacks has put forth the idea that those who feel threatened by the potential use of WMD against them, for example Iranian citizens who fear repressive action from the Iranian government using chemical or biological weapons, could sue companies and individuals who facilitated the development of those weapons, for extreme mental duress, even if they have not yet been the victims of a use of those weapons. Other litigators believe this is a flimsy grounds to bring a suit and such cases would not likely be heard, at least in a U.S. court.

b. Enforcing Judgments

Bringing suit against nuclear traffickers and securing a judgment, however, is only half the battle. The difficulty becomes collecting the funds awarded, especially when assets are scattered in accounts around the world. In a recent civil suit against terrorists, however, the Department of Treasure Office of Foreign Assets Control (OFAC) stepped in and identified accounts from which the victims could collect their judgment against the government of Iran. Assistance from government agencies, like OFAC, who have access to secret financial information, may facilitate the collection of judgments.

F. PEACEFUL USES OF NUCLEAR ENERGY

1. 1-2-3 AGREEMENTS

The United States and other countries, including France, Germany, the United Kingdom, and Russia all provide technical assistance to developing nations to help these nations exploit peaceful nuclear energy. Civilian nuclear energy cooperation with the United States is regulated by so called "1-2-3" agreements, which require indemnification for the United States government and U.S. companies providing assistance, require recipient companies to put in place adequate safeguards to prevent the diversion of nuclear materials, and require certain procedures to ensure reactor safety.

Several of the panel discussions the project has sponsored have promoted the use of nuclear energy assistance as a "carrot" to bring recipient states in line with international nonproliferation initiatives. 1-2-3 agreements, it has been suggested, should include provisions requiring recipient states to criminalize nuclear materials diversion pursuant to 1540 and to participate in PSI interdiction efforts in exchange for receiving nuclear energy development assistance.

Unfortunately, Russia in particular, seems willing to continue providing civilian nuclear energy assistance without insisting on adequate safeguards for nuclear materials, much less requiring recipient states to participate in nonproliferation programs.

G. MISSILE TESTING AND SPACE EXPLORATION

With more missile tests in North Korea in the recent past, the international community has focused on the rights of states to launch space faring projectiles and the circumstances under which states which feel threatened by ambiguous rocket launches may respond in self-defense.

1. RIGHTS TO PEACEFUL SPACE EXPLORATION

Under the UN Outer Space treaty, states have an absolute right to peacefully explore space and launch satellites into orbit, including the right to launch missiles, rockets, and other space faring projectiles for these peaceful purposes. States have therefore exploited this legal right to disguise aggressive ballistic missile tests as peaceful space launches.

2. POLICY CONSIDERATIONS

In formulating a policy response to an ambiguous rocket launch, states are faced with the challenge that it is extremely difficult to tell, with satellite imagery and other reconnaissance mechanisms, whether a missile is actually suited to potential space exploration or satellite launching or is a ballistic missile for weapons delivery. Often only the projectile's trajectory indicates its true purpose, which means states may have to wait until well into flight before they can determine whether a missile launch is legal under peaceful space exploration or ballistic missile test.

3. THE RIGHTS OF OVER FLOWN STATES

Regardless of the nature of a rocket launch, however, peaceful or aggressive, any state whose territory or territorial sea is over flown by a missile has a right to respond in self-defense if it feels threatened. It may also call upon its allies to assist it in intercepting and destroying the missile over its territory under the traditional right to collective self-defense, provided it formally requests such assistance and makes an attempt to notify the UN Secretary General of collective self-defensive action.

The right of preemptive self-defense may not apply in ambiguous rocket launch situations. Once a rocket is over a state's territory it can argue that its sovereignty has been aggressively violated and justify the use of force in self-defense. Under the traditional legal requirements for preemptive self-defense, however, a state must show an imminent threat to use force. A state will frequently be hard pressed to show that a missile to be launched is both a hostile weapons delivery system, rather than a peaceful space faring projectile, and that it is likely to pass over that state's territory and threaten its security. Therefore, states may almost always be forced to react to a rocket launch when it is on the verge of being over flown, when it may already be too late to respond.

SECTION THREE

EVENTS: ABSTRACTS/SUMMARIES

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SECTION 3: EVENTS: ABSTRACTS/SUMMARIES

1. SEPTEMBER 26, 2008—SCOPING CONFERENCE

The project hosted a conference at Georgetown University on September 26, 2008, to share the goals of the Nonproliferation Policy and Law Project with government officials, academics, and policy analysts and to solicit guidance and suggestions for future activities and topics of consideration.

SPEAKERS INCLUDED:

- Philip "Tony" Foley, Acting Director of the Office of Counterproliferation Initiatives, Department of State, who spoke about the birth and development of the Proliferation Security Initiative (PSI)
- Steven Pelak, National Export Control Coordinator, Department of Justice, who addressed the legal challenges of nuclear trafficking prosecutions and the progress made in overcoming these challenges in the United States.
- Anthony Arend, Professor of International Law and Director of the Master of Science in Foreign Service Program at Georgetown University, who discussed the legal justifications for the preemptive use of force to prevent the proliferation of WMD to rogue states and non-state actors.
- Steven Saboe, Director of the State Department Nonproliferation and Disarmament Fund, who discussed the Fund's "under the radar" non-indemnified operations to promote nuclear disarmament in countries such as North Korea and Iran.
- Carl Stoiber, a private consultant who has worked extensively with the U.S. Government, the IAEA, and other international organizations, who discussed the possibility of a nuclear renaissance and the need for implementing new safety and security protocols to reduce the risk of accidents at nuclear power facilities and safeguard fissile materials.
- Orde Kittrie, Professor of Law at the Arizona State University School of Law and Director of the American Society of International Law's Arms Control, Nonproliferation and Disarmament Interest Group, who talked about innovative economic sanctions and divestiture measures for impeding the development of nuclear weapons by rogue states, such as Iran. Professor Kittrie has since joined the project as a consultant through Booz Allen Hamilton.
- David Koplow, Professor of Law at Georgetown University Law Center, who spoke about the development of international law, its ability to regulate states' activities, and the potential applicability of international legal norms to nuclear nonproliferation.

- Jonathan Tucker, Senior Fellow at the James Martin Center for Nonproliferation Studies' Washington, DC Office, who discussed regulatory frameworks for emerging dual-use technologies.
- Michele Garfinkel of the J. Craig Ventor Institute, who explained the potential dual-use applications of synthetic genomics.

Attendees included officials representing the Departments of Justice, Energy, State, Defense, and Treasury, Georgetown University and National Defense University faculty, representatives of the Wisconsin Project, The Hudson Institute, and the Nuclear Threat Initiative, as well as law firms, such as Arnold & Porter, LLP.

TOPICS OF DISCUSSION:

- The legal basis for expanding PSI partnerships and capabilities
- Facilitating the prosecution of nuclear traffickers through international legal assistance and improved nonproliferation statutes.
- Improving sanctions and other mechanisms of financial pressure to impede and discourage development of nuclear weapons by rogue states.
- The preventive use of force by states to prevent the proliferation of nuclear weapons.
- Innovative, informal, non-indemnified cooperative threat reduction activities
- Using peaceful nuclear energy cooperation agreements to encourage fissile materials safeguards and reactor security.
- Improving regulatory frameworks for emerging dual-use technologies.

2. OCTOBER 7, 2008—LEGAL FRAMEWORKS FOR US COOPERATIVE THREAT REDUCTION EFFORTS

The project sponsored a meeting at Georgetown University to discuss the historical development of the CTR program, its application and adaptation to current and future challenges, and the shape of the legal frameworks under which CTR programs are operating around the world.

SPEAKERS INCLUDED:

- Laura Holgate of the Nuclear Threat Initiative, who discussed the history and evolution of US Cooperative Threat Reduction efforts.
- Kenneth Luongo, President of the Partnership for Global Security and Former Senior Advisor at the Department of Energy for Nonproliferation Policy, who addressed the transition of administration of CTR projects to DoE as well as funding problems.

- Steven Saboe, Director of the Nonproliferation and Disarmament Fund, Department of State, who help up the fund's operations as an example of disarmament efforts in the absence of an umbrella indemnification agreement.

Officials from the Departments of Defense, Energy, and State, Booz Allen Hamilton contractors supporting CTR efforts, and representatives of the Nuclear Threat Initiave attended the meeting, which was intended to be a more intimate, non-public conversation with policymakers and support personnel directly involved in Cooperative Threat Reduction activities.

TOPICS OF DISCUSSION:

- Legal frameworks necessary to underpin expanded CTR efforts in new countries.
- The advantages and disadvantages of non-indemnified CTR operations.
- Government funding and administration of CTR programs: rethinking allocation and administration.

3. NOVEMBER 21, 2008—RESOLUTION 1540: DID THE SECURITY COUNCIL EXCEED ITS AUTHORITY?

The project sponsored an open panel discussion on the to examine whether the United Nations Security Council exceeded its legal authority in adopting Resolution 1540, requiring all UN member states to criminalize the actions facilitating the proliferation of WMD to non-state actors. The panelists discussed not only the powers of the security council, but also the impact that the widely-held view that the resolution was unlawful has had on implementation of the resolution's provisions by UN members states, and how to increase compliance in the future.

PANELISTS INCLUDED:

- Dr. Lawrence Sheinman, Senior Fellow, James Martin Center for Nonproliferation Studies, who defended the legality of the resolution.
- Professor Daniel Joyner, University of Alabama Law School, who argued the Security Council overstepped its authority in adopting the resolution
- Dr. Richard T. Cupitt, Expert-on-Mission, United Nations Security Council Resolution 1540 Committee, who discussed the challenges that must be overcome in implementing the Resolution.

The panel discussion drew an audience of over 50 attendees from a variety of government agencies, Washington area think tanks, academics from several universities including Georgetown, George Mason, American University, and The George Washington University, as well as undergraduate and graduate students from several of these institutions.

TOPICS OF DISCUSSION:

- ❑ What legal authority can Security Council resolutions bring to bear on implementing new approaches to nonproliferation.
- ❑ Can implementation of Resolution 1540 be improved by legal and technical assistance from already compliant states in coordination with the 1540 committee?
- ❑ Can customary international law provide an incentive for states to implement the terms of Resolution 1540?

For photos from this event, please visit: http://iilp.georgetown.edu/programs/nlp/unsc1540/

OFFICIAL EVENT DESCRIPTION:

Many states have defended their non-compliance with the provisions of UN Security Council Resolution 1540, which requires states to prevent the proliferation of nuclear materiel to non-state actors, on the grounds that the Security Council did not have the legal authority to adopt the resolution.

On November 21, 2008, The Project on Nonproliferation Policy and Law organized a panel discussion at Georgetown University to consider whether the adoption of the resolution constituted an *ultra vires* act by the Security Council. The discussion indicated that while the Security Council may have the authority to impose legal obligations on states, the legitimacy of its actions may be questioned and lead to lackluster implementation by the international community. This is an important conclusion, as it has been suggested that UN Resolutions might serve in the future as a means to avoid the treaty negotiating process when attempting to address new proliferation challenges.

4. JANUARY 27, 2009—PREVENTIVE WAR: DO WEAPONS OF MASS DESTRUCTION CHANGE THE RULES?

The project sponsored a panel discussion at Georgetown University to discuss whether states have the right under international law to use force to prevent the proliferation of WMD to other

states and non-state actors. The panelists examined the conditions under which states may use force in self-defense, whether the overwhelming threat of WMD proliferation requires a reinterpretation of legal restrictions on the use of force in the name of international peace and security, as well as the practical considerations policymakers should be conscious of in deciding to use force to prevent WMD proliferation.

THE PANEL FEATURED:

- Dr. Anthony Arend, Professor of International Law and Director of the Master of Science in Foreign Service Program at Georgetown University, who argued that state practice and interpretation of international legal norms tolerate the preventive use of force to avert WMD proliferation.
- Dr. Sean Murphy, Professor, The George Washington University Law School, who contended that international law prohibits the use of preventive force, even when the proliferation of WMD is at stake.
- The Honorable James Baker, Judge, U.S. Court of Appeals for the Armed Services, who discussed the policy implications of a decision to use force preventively.
- Col. (Ret.) Guy Roberts, NATO Assistant Secretary General for WMD, who supported Dr. Arend's argument in favor of the use of preventive force and discussed how such a use of force might be coordinated with allies and regional collective security organizations.

The event was attended by representatives of various government agencies, particularly the Department of Defense (Defense Threat Reduction Agency) and Department of State. In addition several congressional staffers, members of the American Society for International Law, Georgetown and George Washington university students and faculty, and reporters from several news agencies including the Washington Post were in attendance.

TOPICS OF DISCUSSION:

- Whether customary international law is evolving to broaden the scope of the right to use force preemptively in self-defense.
- Whether codified, or "hard," international law is able to restrict state behavior.
- Whether a foreign policy embracing the preventive use of force would actually deter the development of nuclear weapons or encourage rogue states to develop such weapons more quickly to defend themselves from a potential attack.

For photos and a complete audio recording of this event, please visit:
http://cns.miis.edu/activities/090127_preventive_war/index.htm

OFFICIAL EVENT DESCRIPTION:
What are the implications of utilizing a policy of preventive war when facing possible threats from the use of weapons of mass destruction? On January, 27, 2009 the Institute for International Law and Politics at Georgetown University, in conjunction with the James Martin Center for Nonproliferation Studies and the American Society of International Law, hosted a panel exploring the legal and policy implications of countering WMD threats through preventive war. Does the nature of these weapons alter the conventional rules of the international system?

The panel included Prof. Anthony C. Arend of Georgetown University, the Honorable James Baker, Col. Guy Roberts (Ret), and Prof. Sean Murphy of George Washington University Law School. Each panelist presented an assessment of the legal and policy implications for US policy-makers when coordinating a response to counter the threat of WMD. Responses to preventing attacks by conventional weapons have traditionally come under the rubric of limited engagement, especially as such policy evolved during the Cold War between the US and USSR. With the end of the Cold War, the growth in non-conventional threats, WMD proliferation, and non-state actors have altered the rules of the game.

Following the panel's discussion, the audience participated in a question and answer session in which students, professors, and professionals furthered the debate over WMD, international law, and policy-making. The panelists' expertise in this field of study represents a range of perspectives through which the topic of WMD and the related international rules can be approached. Below are relevant writings about this issue from the panel participants.

5. MARCH 4, 2009—NUCLEAR ENERGY IN THE MIDDLE EAST: CLEARING THE LEGAL HURDLES
The project sponsored a panel discussion at the Henry L. Stimson center to examine what legal frameworks should be developed to facilitate the development of peaceful nuclear energy capability under the NPT, particularly in the Middle East.

PANELISTS INCLUDED:

- Sharon Squassoni, Senior Associate, Carnegie Endowment for International Peace, who discussed the development of nuclear energy capabilities in Middle Eastern countries and existing legal frameworks governing technological cooperation from Western states with states in the region.
- Patricia Metz, Deputy Director, Office of Nuclear Energy, Safety, and Security, Department of State, who explained the process of negotiating 1-2-3 Agreements for Peaceful Nuclear Energy Cooperation between the United States and foreign governments seeking assistance in developing civilian nuclear energy programs.
- Omer Brown, Attorney at Law, Harmon and Wilmot, LLP, who explained the importance of building nonproliferation and nuclear material security safeguards into international agreements governing peaceful nuclear cooperation.
- Henry Sokolski, Executive Director, Nonproliferation Policy Education Center, who spoke about the potential misuse of "peaceful" nuclear energy.

The event was attended by government officials from the Departments of Defense, State, Energy, and Treasury, several Washington area think tanks, and embassy representatives from Middle Eastern countries.

TOPICS OF DISCUSSION:

- That the spread of peaceful nuclear energy technology, the so-called "Nuclear Renaissance" in regions with weak central governments and hostile non-state actors poses a significant nonproliferation threat if certain safeguards are not implemented.
- That other nations, particularly Russia, which offer nuclear energy assistance, are not imposing adequate safeguard measures in their contracts for technical assistance.
- That nuclear energy programs have and will continue to be used as a cover for nuclear weapons development.

For photos and a complete video recording of this event, please visit:

http://iilp.georgetown.edu/programs/nlp/neme/

OFFICIAL EVENT DESCRIPTION:

Middle Eastern nations from North Africa to the Persian Gulf are increasingly looking to nuclear power to meet their energy needs and have therefore sought to acquire nuclear energy equipment and technology from foreign firms. Nuclear reactor suppliers, however, are unwilling to provide

equipment to states unless they have developed effective safety, environmental, and security regulatory frameworks to manage nuclear power projects, including measures to protect vendors from liability in the event of a nuclear accident.

A panel discussion held at the Henry L. Stimson Center considered the status of such frameworks in various Middle Eastern nations, as well as the legal framework agreements the United States Government has concluded with several Middle Eastern states related to the acquisition of nuclear technology. It is critical to ensure that adequate legal measures are put in place to ensure the security and safety of new nuclear energy facilities before they are constructed.

The panel featured Sharon Squassoni, Senior Associate, Carnegie Endowment for International Peace, Patricia Metz, Deputy Director, Office of Nuclear Energy, Safety, and Security, Department of State, Omer Brown, Attorney at Law, Harmon and Wilmot, LLP, and Henry Sokolski, Executive Director, Nonproliferation Policy Education Center.

6. APRIL 22, 2009—ATTRIBUTION: POST-NUCLEAR EVENT

The project sponsored a two-part panel discussion at Georgetown University to explore the realities of a nuclear event, such as the detonation of a nuclear or radiological device in a major U.S. city, and the ability of nuclear forensic scientists to identify the source of the reactive material used in the blast.

PANELISTS EXPLORING THE REALITIES OF A NUCLEAR DETONATION INCLUDED:

- Dean Robert Gallucci of the Georgetown University School of Foreign Service
- Mr. Paul McHale, former Assistant Secretary of Defense for Homeland Defense
- Dr. Randall Murch, Associate Director of Research Program Development at Virginia Tech
- Mr. Rolf Mowatt-Larssen, former Director of Intelligence and Counter Intelligence at the Department of Energy and Central Intelligence Agency

PANELISTS WHO DISCUSSED THE MECHANICS OF ATTRIBUTION OF NUCLEAR MATERIALS INCLUDED:

- Chief Paul Maniscalco, Senior Research Scientist and Principal Investigator at the George Washington University Homeland Security Policy Institute
- Ms. Laura Rockwood, Principal Legal Officer at the International Atomic Energy Agency
- Mr. Henry Schuster, a 60 Minutes Producer

- Mr. Michael Carter, Deputy Principal Associate Director for Programs/Global Security at Lawrence Livermore National Laboratory

This was perhaps the project's most well-attended event, with officials from the Departments of Defense, State, Energy, and Homeland Security, researchers from Lawrence Livermore and Pacific Northwest National Laboratories, IAEA staff, students and faculty from several Washington, DC area universities, embassy representatives from several countries, and reporters from the Washington Post, New York Times, and Wall Street Journal in attendance.

TOPICS OF DISCUSSION:

- The need to develop a national emergency response plan that improves coordination among federal, state, and local authorities.
- The challenge of tracing a nuclear signature to identify the origin of nuclear materials.
- The legal and political difficulties in using attribution data to respond against the believed originators of an attack.
- The potential of holding the originator of the nuclear material liable for damages if such materials were inadequately safeguarded.

For photos and a complete video recording of this event, please visit:
http://iilp.georgetown.edu/programs/nlp/attribution/

OFFICIAL EVENT DESCRIPTION:

The Georgetown University Institute for International Law and Politics, in conjunction with the James Martin Center for Nonproliferation Studies and the U.S. Defense Threat Reduction Agency, hosted a panel discussion entitled, "Attribution: Post-Nuclear Event," on April 22, 2009, on Georgetown's Main Campus.

This event consisted of two panels, the first of which considered the realities of a nuclear event, such as the detonation of a nuclear weapon by terrorists in a populated urban center and focused on the ramifications of such a nuclear attack and how first responders and local authorities can best react in its aftermath. The Second, the panel addressed the mechanics of attribution, which involves tracing the "nuclear signature" of fissile materials used in a nuclear explosion and identifying the facility that produced it.

The first panel was composed of Dean Robert Gallucci of the Georgetown University School of Foreign Service, Dr. Randall Murch, Associate Director of Research Program Development at Virginia Tech, Mr. Paul McHale, former Assistant Secretary of Defense for Homeland Defense, and former Director of Intelligence and Counter Intelligence at the Department of Energy and Central Intelligence Agency, Mr. Rolf Mowatt-Larssen.

The second panel featured Chief Paul Maniscalco, Senior Research Scientist and Principal Investigator at the George Washington University Homeland Security Policy Institute, Ms. Laura Rockwood, Principal Legal Officer at the International Atomic Energy Agency, Mr. Henry Schuster, a 60 Minutes Producer, and Deputy Principal Associate Director for Programs/Global Security at Lawrence Livermore National Laboratory, Mr. Michael Carter.

7. MAY 18, 2009—THE LEGAL AND POLICY IMPLICATIONS OF AMBIGUOUS ROCKET LAUNCH: LEARNING FROM THE NORTH KOREA CASE

The project sponsored a panel discussion on the topic of rocket launches to examine the rights of states in launching and responding defensively to missiles and other spacefaring projectiles, whose purpose may be unclear.

PANELISTS INCLUDED:

- Mr. Benjamin Baseley-Walker, Legal and Policy Consultant for the Secure World Foundation
- Dr. Bruce MacDonald, Senior Director, Strategic Posture Review Commission
- Dr. Catherine Lotrionte, Associate Director of the Georgetown Institute for International Law and Politics

This event was attended primarily by government officials from the Departments of Defense and State and representatives of Washington, DC area think tanks.

TOPICS OF DISCUSSION:

- The rights of states under international law to peacefully explore space
- The rights of states under international law to respond in self-defense either individually or collectively to threatening projectiles that enter their airspace
- The frequent impossibility of identifying the purpose of space launches and its impact on determining policy responses.

For a complete video recording of this event, please visit:
http://iilp.georgetown.edu/programs/nlp/nklaunch/

OFFICIAL EVENT DESCRIPTION:
The James Martin Center for Nonproliferation Studies and the Georgetown University Institute for International Law and Politics sponsored a panel discussion to examine the legal and policy implications of ambiguous rocket launches. The panel featured: Mr. Benjamin Baseley-Walker, Legal and Policy Consultant for the Secure World Foundation, Dr. Bruce MacDonald, Senior Director, Strategic Posture Review Commission, and Dr. Catherine Lotrionte, Associate Director of the Georgetown Institute for International Law and Politics.

The panelists addressed the technical challenges the international community faces in identifying the purpose of a missile, rocket, or other spacefaring projectile. The intent of a state in launching such a projectile is of central importance in determining the legality of the launch and how other states may respond. The panel reached the conclusion that it is effectively impossible to distinguish between a peaceful space launch vehicle, such as a rocket designed to carry a communications satellite into orbit, and a missile designed for military purposes, such as the delivery of nuclear warheads. The same rocket technology can, and often is, used for both purposes.

The panelists also considered the status of rocket launches under international law. The UN Outer Space Treaty grants all states the right to explore space for peaceful purposes, including placing a satellite into orbit. Therefore, if a state, through the presentation of intelligence information, cannot prove a particular rocket launch is intended for non-peaceful purposes, the launch itself cannot be considered illegal. However, regardless of the intent of the launch, a state may have a right to respond with force in self-defense. A state whose territory or territorial sea is overflown or whose airspace is violated by a rocket may, pursuant to UN Charter Article 51, use force in self-defense, including the interception and destruction of the rocket. This right may also be exercised collectively with allies.

Finally, the panelists made policy recommendations for states launching rockets. Launching states should explain the purpose of their launches, provide the international community with advanced notice of a launch, make reasonable attempts to avoid overflying another state's territory, consult with nearby states to ensure launch safety, and ensure command and control mechanisms are in place that will allow it to maintain control over any spacefaring projectiles it launches.

APPENDIX 1

SEPTEMBER 26, 2008 – PROJECT SCOPING CONFERENCE

APPENDIX 1

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APPENDIX 1: SEPTEMBER 26, 2008—PROJECT SCOPING CONFERENCE

ATTENDEES

NAME	ORGANIZATION
Anthony Arend	Georgetown University School of Foreign Service
William Baumgartner	US Coast Guard
Deborah Berman	Monterey Institute James Martin Center for Nonproliferation Studies
Chris Bidwell	Defense Threat Reduction Agency
James Burger	Defense Department Office of General Counsel
Burrus Carnahan	State Department – George Washington Law School
Thomas Cochran	Natural Resources Defense Council
Philip Foley	State Department
Christopher Ford	Hudson Institute
Michele Garfinkel	J Craig Venter Institute
Allan Gerson	Attorney Gerson &…
George Gillette	Defense Threat Reduction Agency
Theodore Hirsch	State Department - Office of the Legal Adviser
Laura Holgate	Nuclear Threat Initiative
John Holum	Independent Consultant
Philip Johnson	Georgetown University Institute of Int'l Law & Politics
Dave Jonas	National Nuclear Security Administration
Christopher Joyner	Georgetown University Institute of Int'l Law & Politics
Carol Kalinosky	Independent Consultant
Orde Kittrie	Arizona. State Univ Sandra Day O'Connor School of Law
David Koplow	Georgetown Law Center
Mathew Kroenig	Georgetown University Institute of Int'l Law & Politics
Catherine Lotrionte	Georgetown University Institute of Int'l Law & Politics
Gary Milhollin	Wisconsin Project

ATTENDEES [CONTINUED]

NAME	ORGANIZATION
Steven Pelak	Justice Department
Caroline Russell	State Department
Steven Saboe	State Department
Arthur Schulman	Wisconsin Project
Douglas Shaw	Georgetown University Institute of Int'l Law & Politics
Jared Silberman	US Navy
Jeffrey Smith	Arnold and Porter
Suzanne Spaulding	Bingham Consulting
Leonard Spector	Monterey Institute James Martin Center for Nonproliferation Studies
Carl Stoiber	Independent Consultant
Jonathan Tucker	Commission on Prevention of WMD Proliferation and Terrorism
Thomas Wuchte	State Department

EVENT NOTES

INTRODUCTION

Mr. Spector introduced the program to the participants, who then introduced themselves. Mr. Spector then provided an overview of the day's agenda and highlighted the different guest speakers.

Mr. Spector drew the participants' attention to the launch of WINS (World Institute for Nuclear Security), which, he noted, may be a good partner for the program.

Dr. Shaw took the floor after Mr. Spector's introduction of the day's activities to explain the logic behind the creation of the Program on Nonproliferation Policy and Law. He mentioned that the nexus of security studies and law was not a major focus of scholarship at present, and the program will not only conduct research into this field, but also make suggestions for policy formation and seek to educate a new generation of legally-minded policy makers. With these goals in mind, the coalition of the Center for Nonproliferation Studies' "think tank" capacity, with the Institute for International Law and Politics' educative mission and the Defense Threat Reduction Agency's backing was an excellent combination.

After explaining the goals of the program, Dr. Shaw gave the participants an overview of its upcoming activities, including a conference in October about legal obstacles to CTR, a UN-day panel concerning the authority of the Security Council (in passing Resolution 1540), as well as an event in December about the legal implications of preventive war.

CDR. Bidwell took the floor next on behalf of DTRA/ASCO. He spoke to the value of considering international law when formulating foreign policy, and explained that it was for these reasons that DTRA decided to sponsor a project to study the intersection of international law and Nonproliferation. He added that the day's meeting was called to get input from other experts in the field on how they believe the project can best address its goals.

TONY FOLEY ON PSI

Dr. Shaw then introduced Mr. Foley, who took the floor to discuss the history and legal foundations of the Proliferation Security Initiative (PSI). Mr. Foley emphasized that this program is based on existing legal authorities, so as to be consistent with states' laws and their interpretations of international law. He also noted that the UN sanctions resolutions against Iran and North Korea, which prohibit transfers of sensitive goods to these states, are a good complement to PSI and that the United States cites these resolutions as part of its diplomatic outreach to encourage states to join the initiative. He cited the inherent difficulty of controlling dual-use items, as well as inadequate export controls in many states, as the impetus for PSI. He then discussed the history of the program and its achievement in unraveling the A.Q. Khan network. In his subsequent treatment of the informal nature of PSI, he reiterated the point that dual-use items post the biggest challenge to efforts to control illicit WMD-commodity trafficking. PSI exists to improve the coordination and efficacy of existing mechanisms to interdict such trafficking, he said. He then briefly characterized PSI interdiction missions, noting that, contrary to popular belief, not all originate at the behest of the United States. He concluded with the caveat that the program is a work in progress, but nonetheless may provide a useful "new model" of international cooperation, noting that it served as the basis for the Global Initiative to Combat Nuclear Terrorism.

QUESTIONS:

Mr. Tucker – Do you think active international participation in the program is sustainable?

Mr. Foley: Program still expanding, seems to be gaining international support.

Mr. Stoiber – Why did the framers of PSI elect not to base the activity on a formal treaty arrangement?

Mr. Foley: They recognized the difficulty in obtaining widespread international support for a formal treaty arrangement, the drawback of treaties as only creating obligations for states parties, and were concerned the Senate might not grant advice and consent for a treaty. Ultimately the issue was delay and the desire to act quickly, but Foley alluded to the difficulties of negotiating multilateral treaties and obtaining the senate's consent as the cause of delay.

Mr. Rishikof – Have the activities of PSI now created fertile ground for an international treaty codifying its principles?

Mr. Foley: No. The advantage of PSI is that is an informal partnership. A treaty relationship would not be supported by many PSI partners, including Gulf transshipment states that do not wish overtly to aggravate Tehran.

Ms. Kalinosky – Why have the successes of PSI not been widely publicized? Additionally, maybe the concept behind PSI is flawed, should focus on prevention rather than reaction by energizing export controls. What do you do when manifests are considered proprietary information?

Mr. Foley: Even with export control efforts, things slip through, so it is crucial to be able to respond when that happens. Biggest obstacle to PSI is obtaining flag-state consent to board vessels, though the US has legally-binding boarding agreements with 9 states. Also, the government is negotiating a new agreement to criminalize use of ships to transport WMD materials.

Ms. Kalinosky – Still, efforts should focus on current failure to take intermediate action to obviate the need for PSI-like activities.

Dr. Kroenig – Several critical countries are not yet part of PSI (especially in SouthAsia: India/Pakistan). What efforts have there been to identify and reach out to really important countries? Why do they remain hesitant to become part of PSI?

Mr. Foley: Some states are simply not prepared to endorse PSI; they give predictable reasons, such as concerns over the program's efficacy, but really they are not yet politically ready.

Mr. Cochran – Would any smuggling have gone undetected were it not for PSI?

Mr. Foley: It is hard to say but certainly possible.

CDR Bidwell – Does PSI have the potential to change international law, to make trafficking of WMD a *jus cogens* violation, as interdictions at sea did for the slave trade?

Mr. Foley: Probably not, or at least not in the foreseeable future. There is still considerable reluctance among states to take actions, often because participation in PSI can be bad for business.

Ms. Kalinosky – But perhaps this can become part of international law in another way, such as codification by convention or integration into existing maritime laws.

STEVEN PELAK ON EXPORT CONTROLS AND NUCLEAR SMUGGLING

CDR. Bidwell introduced the panel's first speaker, Mr. Steven Pelak, first ever national export coordinator for the Justice Department.

Mr. Pelak began his presentation with an explanation of why the justice Department undertakes criminal prosecutions and investigations against certain violators, while refraining from pursuing prosecution in other cases. He used the example of US v. Asher Karni, a case which Mr. Pelak himself prepared for trial. Karni was indicted for attempting to purchase over 200 spark gaps, devices used in medical equipment, but also capable of detonating nuclear devices. The supplier alerted BIS at the Commerce Department (most likely because they thought it was a government sting operation.)

The Justice Department then discovered that the devices were destined for Pakistan, via South Africa. The US government worked in real time with South African authorities to execute simultaneous search warrants against Karni, leading to the issuance of a warrant for his arrest while he was on a ski vacation in Vail, Colorado. Karni subsequently pled guilty to several additional counts of exporting restricted goods to countries such as India. Karni cooperated and was therefore only sentenced to three years, despite the federal prosecutor's desire to obtain a minimum 6 year sentence (pursuant to a conspiracy statute, 18 USC 371). The US attorney for the District of Columbia prosecuted the case, rather than the federal prosecutor in Boston, where the offense occurred, because many local prosecutors are reluctant to bring cases because they have other priorities or fear the prosecution will be unsuccessful. [Did he actually say refuse; would "reluctant to bring cases given other priorities" be better?] You're right, he never said refuse, though he indicated frustration that he encouraged local DAs repeatedly to prosecute certain cases and they did not cooperate because they either had other priorities, or did not feel they will be successful.

Mr. Pelak mentioned that a critical weakness in the prosecution of nuclear smugglers is the disposition of federal judges, who are not experienced in national security/nuclear smuggling cases and who see an educated, white-collar defendant and no direct damage and are inclined to give lenient sentences.

Mr. Pelak emphasized that export offenses, no matter how small or seemingly innocuous, can have significant implications on US force superiority and homeland security, and stopping those trading in smaller goods can provide intelligence on larger networks trafficking more sensitive items. Placing suspects on Commerce/OFAC entity lists, freezing their assets and denying them access to the banking system, prevents established financial institutions from accepting their funds. Mr. Pelak emphasized that relevant US statutes need to be updated and strengthened, and approved by the Congress, so that prosecutors no longer need to rely on executive orders like IEEPA.

How does the Justice Department conduct its investigations? Not through the office of national security in DC, but through local district attorney's offices around the country. How does the Department define an offense?

1. Export violation has to involve WILLFUL violation of export control statutes (i.e. knowledge that the activity is illegal, not necessarily why it is) Justice Department uses the following criteria to determine consciousness of guilt ("the Three C's"):
    a. Concealment of goods/destination/intent
    b. Cost – the use of shipping mechanisms that are not cost efficient
    c. **C**ircuitousness – the selection of shipping routes that take goods out of their way to disguise their final destination.

(Mr. Spector intervened to note that participants would be receiving information and slides from the meeting through a website established for the project. Details would be communicated to them by e-mail.)

Mr. Stoiber interjected that the intent requirement Mr. Pelak mentioned in his presentation is also a component of many international criminal law treaties, which makes them difficult to incorporate into domestic law because many states do not have developed domestic legal practices addressing the establishment of intent.

Mr. Gillette recalled his experience as an export control prosecutor with the Commerce Department and explained that national legal systems need to develop a lower burden of proof for establishing proving willfulness (i.e. that there is good reason to believe someone participated in an activity intentionally, even though he knew it was against the law).

Mr. Cochran inquired about the legal constraints to placing individuals and corporate entities on a "watch list," to which Mr. Pelak responded that government agencies have very broad discretion to do so, but that watch lists have limited efficacy because judges and prosecutors are often unfamiliar with them and therefore do not monitor them.

Mr. Rishikof asked whether there was any interagency clearing house in the government to make prosecutors and judges and other involved officials aware of the mechanisms available to go after nuclear proliferators, through OFAC restrictions, watch lists, fraud statutes, related minor offenses, tracking suspected individuals and conducting border searches of them. Mr. Pelak responded that no such organization existed and that this is a major weakness in the system.

LEONARD SPECTOR ON EXPORT CONTROL PROSECUTIONS IN EUROPE

Mr. Spector then began his presentation on the European community's lamentable record in prosecuting suspected nuclear smugglers, which he contrasted with a general pattern of successful prosecutions in the United States. He presented a matrix outlining problems that occur repeatedly in such prosecutions. Representatives from the Wisconsin Project nodded at these efforts and indicated that they are conducting similar work (opportunity for collaboration?)

Ms. Kalinosky suggested that it would be an interesting project to try to track the implementation of operative paragraph three of UNSCR 1540 to determine how certain states have worded their nonproliferation/export control statutes, determine how effective they have been, and develop model statutes to help states draft the most effective laws possible.

Mr. Wuchte discouraged such a project as superfluous, since work in the area is already being undertaken. He suggested that the 1540 Committee's website already outlines most states' failure to implement the resolution and mentioned that trying to obtain country specific details about nonproliferation statutes is nearly impossible, even for the US government. Matrices of data may be released by the State Department and will help with such research. More useful, Mr. Wuchte suggested, would be simply developing model statutes to address issues already known to be critical to ensuring successful prosecution. He suggested that there needs to be international buy-in to such a project and that it might be undertaken in cooperation with the UN 1540 Committee.

ANTHONY AREND ON THE PREEMPTIVE USE OF FORCE

Dr. Arend began his presentation with Israel's recent strike on the al-Kibar reactor in Syria and compared the attack with Israel's earlier action against the Osirak Reactor in Iraq.

He explained that the current law governing the preemptive use of force dates back to the 1837 *Caroline* case, which established two criteria for preemptive self- defense: Necessity (imminence of threat), and proportionality (of response). While Dr. Arend believes the *Caroline* criteria are still effective international law, they have been challenged increasingly in recent decades. Israel's attack on Osiraq reactor, for example, was undertaken preventively and could not be justified by immediate threat. He believed the attack on the Syrian reactor could be

characterized similarly. He then explained that the Bush doctrine reiterates the criteria established in the *Caroline* case, with the caveat that modern threats may no longer allow states to wait until an attack is inevitable. Dr. Arend believes this strategy is well guided but asked what would replace the imminence requirement: aggressive intent, past history of aggression, or threatening rhetoric? The problem is no states embracing the preemptive use of force, such as the United States and Israel have suggested an additional criterion and do not seem to abide by any particular one consistently.

Dr. Arend explained that he is one of the few international legal scholars who believes the UN Charter is no longer effective international law because state practice, as evidence of emerging customary international law, has been at variance with the charter almost since its entry into force. Dr. Arend remarked that the disregard of the UN Charter is not a positive influence on the international political system, but rather a reality with which states are confronted. He welcomed the efforts of the Nonproliferation Policy and Law project and other programs designed to return to a more UN Charter based approach for addressing international security issues.

Mr. Spector noted that the Israeli attack on the al-Kibar reactor in Syria met with little criticism from the international community, in contrast to the nearly universal condemnation of Israel's strike against the Osirak reactor in 1981 He explained that since the Osirak reactor was a declared nuclear facility under IAEA inspection the international community would not tolerate unilateral action against it, whereas the Syrian reactor was secret and apparently designed to produce plutonium for nuclear weapons. Perhaps, then, these factors be emerging as a new set of criteria for justifying the preemptive use of force.

Mr. Rishikof asked whether the increased international acceptance of the preemptive use of force might undermine national sovereignty. If states are increasingly willing to resort to the self-help approach to international law enforcement, how can any state be secure in its territorial integrity?

Dr. Arend agreed that this might be a problem, which is why it is important to develop new internationally acceptable standards governing the preemptive use of force.

Mr. Saboe sought to clarify whether uses of force dating from 1945, at the inception of the UN Charter complied with the framework that document established.

Dr. Arend explained that the use of force has in very few cases ever complied with the restrictions of the UN Charter and for that reason he believes the charter framework has not recently met its demise but rather was stillborn.

Dr. Kroenig wondered whether attacks and reprisals in the context of an ongoing war were subject to the same legal restrictions as other preemptive uses of force.

Dr. Arend responded that traditional *ius ad bellum* restrictions would govern the acceptability of uses of preemptive force during wartime.

Ms. Kalinosky wondered whether new multilateral conventions and Security Council resolutions prohibiting the transfer of weapons to non-state actors might allow the use of force to prevent such actors from obtaining weapons.

Dr. Arend responded that none of these resolutions or conventions authorizes the use of force to enforce their provisions.

STEVEN SABOE ON THE NON-PROLIFERATION AND DISARMAMENT FUND

Mr. Saboe explained that the 14-year old Non-Proliferation and Disarmament Fund (NDF), administered by the Department of State, is not a primary counter-proliferation measure but rather a supplementary tool which can be deployed when new opportunities arise without the need to address traditional concerns for umbrella agreements with host countries covering such issues as liability. The program is unique, very low profile, and operates at full risk. NDF personnel, for example, are currently working in North Korea, and the United States government may not be able to secure their release from the country should something go wrong in the US-North Korean relationship. The program's philosophy is to help the host country solve its own problems to avoid giving the impression that the United States is trying to solve those problems. Saboe noted the program had paid for the removal of highly enriched uranium from Kazakhstan in Operation Sapphire, for the destroying IRBMs in Eastern Europe, for the removal of highly

enriched uranium from Yugoslavia, for the dismantlement of the Libyan nuclear weapon program, and for the disabling of North Korea's Yongbyon reactor.

CDR. Bidwell asked how large the program was and whether it received funding for its efforts from other government agencies.

The NDF is quite small compared to other CTR-style programs; receives "no-year funds," allowing it to carry over balances; and has very strong "notwithstanding" authority. In-country, it attempts to maintain a small footprint, with a very limited number of U.S. personnel. The Fund operates with considerable flexibility. It has sometimes waived DCAA audits, sometimes operates with no US personnel on the ground. More typically, it turns over implementation to the Department of Energy, with roughly 60% of NDF funds going to that agency. Annual budget is roughly $40 million. The Fund has roughly $200 million under management.

Mr. Saboe proposed that DTRA's authorities be modernized to enable it to operate in a similar fashion, when demanded by the specifics of particular cases.

Ms. Kalinosky inquired as to whether the programs activities were entirely self-directed or if it accepted requests to conduct certain operations or provide assistance to other agencies.

Mr. Saboe replied that most of its tasks are undertaken pursuant to requests for assistance from other USG agencies, which the NDF leadership considers for approval. The funding is obtained not from those other agencies but directly from Congress.

Ms. Kalinosky asked if most of the program's operations concern conventional or nonconventional weapons?

Mr. Saboe indicated that the NDF is almost exclusively concerned with WMD and other unconventional weapons. The considerable risks involved in its operations would not be justified for responding to the threat posed by conventional weapons.

Mr. Jonas asked how most of the NDF's budget is spent. He thought, given the nature of the program, that salaries and travel expenses might be the largest costs. In addition, he asked how the NDF is able to get employees to work without indemnification.

Mr. Saboe answered that most NDF funds are directly transferred to host country governments to help them carry out disarmament operations under limited US supervision. As far as attracting individuals to participate in the NDF's operations, Mr. Saboe explained that understandably very few contracting companies were willing to accept the risks involved but that the program's USG employees, many former military, were excited to be a part of such critical operations, despite the risk.

CARL STOIBER ON NUCLEAR SECURITY AND THE NUCLEAR RENAISSANCE

Mr. Stoiber explained that there is an important difference between nuclear security and nonproliferation efforts; namely, that nuclear security generally focuses on preventing incidents that lead to radiological releases from unauthorized activities. (OK)Nonproliferation describes efforts to prevent states and non-state actors from acquiring nuclear weapon capabilities. These two activities, however, are naturally related and mutually-reinforcing. Mr. Stoiber explained that a broad range of IAEA guidance documents are rapidly developing nuclear security measures to parallel existing nonproliferation regulations. The IAEA is capable of creating international legal norms regarding nuclear security through binding resolutions, internal decisions, guidelines issued by related organizations, such as the Nuclear Suppliers Group, etc.

Mr. Stoiber found clear evidence that new international legal regulations are emerging to ensure the safety and security of nuclear materials and prevent the proliferation of nuclear technology, but equally evident is an expansion in nuclear energy programs around the globe. Mr. Stoiber calls this a "nuclear naissance" rather than "nuclear renaissance," because much of the projected growth in nuclear energy use will come in states that have never before had nuclear power plants. (AGREED) This expansion increases nuclear security vulnerabilities and shortcomings, which have three fundamental causes:

1. National legal and regulatory measures are frequently inadequate to address the threat and lack international standardization to be applicable across jurisdictions.
2. These measures are not enforced and those responsible for their implementation lack adequate training.
3. There is a hard-to-balance tension between confidentiality of nuclear secrets/facilities capabilities and openness of security regulations. Mr. Stoiber saw a possible solution in the

preparation of model nuclear security regulations, to which the Program on Nonproliferation Policy and Law could contribute.

Mr. Gillette asked why the IAEA has not been more vocal in encouraging the development of effective national nuclear security laws.

Mr. Stoiber attributed this to the agency's limitations as an organization of member states, who often do not desire to incorporate such measures into their national legislation.

Ms. Purcell wondered how much support the EU provides in cooperation with the IAEA to promote nuclear security.

Mr. Stoiber responded that the EU has its own independent nuclear security program, which is very effective, but that it also makes significant financial contributions to the IAEA's efforts.

ORDE KITTRIE ON INNOVATIVE LEGAL MECHANISMS FOR NONPROLIFERATION

Mr. Kittrie began by describing the government's traditional reliance on law as a reactive tool when things go wrong, and expressed his excitement to participate in the Program on Nonproliferation Policy and Law Project to explore the use of law in a more proactive manner. He introduced his presentation with the concept of "lawfare," or the use of legal mechanisms to overcome threats to national security and fight against international adversaries in place of traditional military responses.

He lamented that innovative legal tools for combating proliferation have not been exploited. Lawfare, he said, is a great way to involve not just the government policy making community, but also legal professionals involved in the war on terrorism and the protection of national security. The NPT, one of the only multilateral legal mechanisms regulating nuclear proliferation, is severely flawed and allows non-nuclear weapons states to master the entire nuclear fuel cycle. The treaty has also proven steadfastly resistant to modification, which might adapt it to emerging threats and make it a more effective legal document. Mr. Kittrie proposed amending the NPT through the Security Council by means of what he characterized as global legislative measures. He noted that Resolution 1540 filled gaps in the NPT in this fashion. He offered that new resolutions could require adoption of the Additional Protocol (granting the

IAEA expanded inspection rights in NPT non-nuclear weapon states); could specify pre-set sanctions for NPT or safeguards violations; and could provide in advance for dealing with withdrawals from the treaty.

Mr. Kittrie next turned to innovative approaches to strengthen economic sanctions. He noted that state and local government pension funds' divestment of stock in companies trading with Iran could be a powerful tool and mentioned that the District of Columbia is now considering such a measure. Congress has endorsed a similar approach regarding Sudan, he noted, through the Sudan Divestment Enabling Act, which authorizes divestment by state and local public entities. He noted similar legislation to address Iran, "The Iran Divestment Enabling Act," had passed the House.

Mr. Kittrie then explained that another law, the Iran Sanctions Act, requires the imposition of sanctions on corporations that make more than a $20 million a year investment in the Iranian energy sector. Although the sanctions have never actually been imposed, the risk of investigation and penalties has discouraged many foreign companies from considering investment in Iran. Congress could make more effective use of the Act by expanding its scope to penalize other types of economic engagement with Iran.

The limitation of gasoline exports to Iran would for example be a powerful coercive strategy, given that the country has very limited domestic refining capacity. Sanctions on corporations facilitating exports of gasoline to Iran will make it clear that the losses these companies will incur in the United States will more than offset any gains they may make in trade with Iran. Despite bipartisan support, however, the US government has done little to implement such sanctions. (The United States should also work toward a strategic partnership with Europe to ensure a near universal enforcement of sanctions, he added.)

Mr. Kittrie then offered a number of specific proposals to pressure several foreign companies currently exporting gasoline to Iran. One such company, Vitol, was convicted in state court of larceny arising from its participation in the Iraq Oil for Food program. That company is now under federal investigation for similar crimes. He suggested that the use this threat of prosecution as a lever to persuade the company to give up its gasoline exports to Iran. Other

companies he identified might by subject to similar governmental pressure by the threat of withholding permits for energy projects in United States or by the withholding of Export-Import Bank loans they are seeking. the He also proposed the US Government garnish the revenue obtained by major international corporations through trade with Iran and use these funds to pay judgments against Iran entered in US courts.

Divestment was another approach he suggested for pressuring these companies by integrated their involvement with Iran into federal, state, and municipal government contracting procedures. A Minnesota transit project, for example, refused a bid from a European company because that company was trading with Iran. The US government also underwrites many loans to foreign oil enterprises, which could be used to coerce them to end trade with Iran.

Finally, Mr. Kittrie explored the use of civil litigation as a nonproliferation tool. He acknowledged that many questions remain to be answered, such as whether the private sector can target foreign leaders and terrorists in civil suits for damages and whether the US Government should support and facilitate these prosecutions.

Upon the conclusion of Mr. Kittrie's presentation, Mr. Wuchte offered comments regarding the implementation of UN Security Council Resolution 1540, noting that the legal mechanisms outlined in Mr. Kittrie's presentation were relevant to the implementation and revitalization of that resolution 1540. He stressed that the Security Council had full authority to adopt the resolution and impose requirements on states to implement effective controls over WMD materials and commodities. He also dismissed the argument, made by some governments, that 1540 was not targeted at states, but at non-state actors; rather, he emphasized, while non-state actors are the resolution's ultimate target, the resolution creates immediate legal obligations on states, as was made clear in the "explanation of votes" cast when the resolution was adopted. He argued that states have questioned the Security Council's authority as a means for deflecting attention from their own unwillingness to combat proliferation and implement 1540, not because they have serious legal concerns about the Security Council's role.

Mr. Wuchte, referring to Mr. Kittrie's comments noted the importance of considering secondary consequences from the initiatives the latter had suggested. There is a danger, for example, that

as the US imposes additional conditions on contracts, permits, loans, and the like that foreign companies will not deal with us, but will take their business elsewhere. Cutting gasoline sales to Iran also raises the risk of Iran turning to Russia for refined products or building refineries of its own.

Mr. Stoiber then reacted to Mr. Kittrie's criticism of the NPT by arguing that states should question the argument that the treaty guarantees the right of all states to develop uranium enrichment and plutonium production capabilities. He believed that these capabilities are so closely associated with the production of nuclear weapons that there should be a much higher burden on states to justify their plans for pursuing these technologies for "peaceful" purposes. He believed these shortcomings can be addressed better through multilateral negotiations and the ratification of a new treaty rather than using the Security Council as a short cut.

Mr. Kittrie agreed with Mr. Stoiber that using the Security Council to impose the will of certain countries on the entire international community does carry the risk of engendering ill will, which could make the resultant resolution difficult to enforce.

DAVID KOPLOW ON INNOVATIVE LEGAL TOOLS

Mr. Koplow began with an overview of the sources of international law:

1. Legally-binding treaties and conventions.
2. Customary norms as evidenced by the practice of states.
3. The opinions of courts and the writings of legal scholars.
4. The guidelines of international regulatory authorities
5. Politically-binding international agreements often made by heads of state.
6. Parallel unilateral statements of intent (the basis for PSI)
7. The ICJ, through its advisory opinions, though these are not binding.
8. Security Council Resolutions
9. The decisions and policies of international institutions

Mr. Koplow then explained that international law can create obligations not only for states but also for multinational corporations, nongovernmental organizations, other nonstate actors, and

even individuals. He believes the Program on Nonproliferation Policy and Law should consider all of these sources of international law and their possible objects.

JONATHAN TUCKER ON EMERGING TECHNOLOGIES

Mr. Tucker began by stressing the importance of developing a theoretical framework for characterizing dual-use technologies and determining what regulatory measures are most appropriate for addressing certain kinds of technological developments. Mr. Tucker (sorry, typo) explained that while most definitions of dual-use imply the potential for deliberate misuse, there is an important risk inherent in inadvertent misuse, as well. He categorized the risk presented by unintended misuse as a safety concern and risks presented by deliberate misuse as a security concern. Mr. Tucker explained that new technologies can develop dual-use characteristics either suddenly or gradually. Even in case of revolutionary transition, Mr. Tucker argued, some preceding evolutionary development is almost always necessary, and allows policy makers the opportunity to consider the implications of the new technology and the importance of regulating it. Risk assessment for new technologies must therefore start at their inception and consider both safety and security implications, though these evaluations may be difficult at early stages of development. Regulatory options may include restricting access to dual-use technology, limiting the scale of application of the technology, and restricting publication of sensitive information that may enable access to dual-use technology. A "bar-coding" procedure, by which a genetic sequence or chemical signature is used to identify the facility where biological and chemical agents are produced may help trace the origin of stolen agents, especially in the aftermath of an attack in which they were used.

MICHELE GARFINKEL ON SYNTHETIC GENOMICS

Ms. Garfinkel explained that she would be using synthetic genomics as a straightforward model of the emergence and regulation of new technologies. Synthetic genomics illustrated the difficulty in controlling access to dual-use technology since customized organisms can be ordered from legitimate scientific research companies, and even if certain groups are denied access to these companies' services, they can acquire the necessary synthesis equipment easily and legally. Therefore it is extremely difficult to develop effective access control regulations that do not severely impede scientific progress and the conduct of legitimate business. When

considering regulation it is important to weigh the risks and benefits of the technology under consideration. Ms. Garfinkel explained that there are three logical points for beginning to regulate new technologies: right after capability first becomes known, if the risks are great; at the point where the technology becomes dual-use and the risks associated with it become clear; or once additional developments increase the risks associated with an established technology. She explained that commercial firms have been largely the target of technological regulation, to limit access to technology, but that measure should also be put in place to penalize individuals who misuse the technology.

Mr. Kittrie asked what steps are being taken to address synthetic genomics.

Ms. Garfinkel replied that legislation has been introduced in Congress at and that a multilateral convention is under consideration.

CDR. Bidwell wondered whether self-regulation was a viable option.

Mr. Tucker explained that the biotechnology community is so decentralized and located in so many different states that self-regulation was unlikely to be effective.

Ms. Kalinosky asked whether regulating emerging technologies was a topic of significant international concern and if so, in what international fora it was discussed. She also inquired whether biotechnology firms whose services could potentially be misused were under government scrutiny.

Ms. Garfinkel and Mr. Tucker explained that there was significant interest in regulating emerging technologies and that the Australia Group was actively involved in the process. They also mentioned that the FBI is responsible for investigating suspicious transactions undertaken by biotechnology firms located within the United States and that most of these firms have been cooperating with its investigations and preventive efforts.

CDR. Bidwell commented that their may be a civil litigation aspect involved for victims of chemical and biological accidents or attacks to sue the companies that make these technologies available.

Mr. Pelak welcomed Mr. Tucker's "bar-coding" suggestion explaining that in the aftermath of the September 11 attacks it was extremely difficult to trace the origins of materials used to execute the attacks and that any measures to help identify those responsible would make prosecutors' lives much easier.

CONCLUDING REMARKS

Mr. Spector, Dr. Shaw, and CDR. Bidwell expressed their gratitude for the participants' time and thoughtful ideas and insights. They explained that the subject areas identified for further research and activity were very promising. They assured the participants that the members of the Project would continue to communicate with them about future events and would make the day's materials available to them electronically.

APPENDIX 2

OCTOBER 7, 2008 – LEGAL FRAMEWORKS FOR COOPERATIVE THREAT REDUCTION

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APPENDIX 2: OCTOBER 7, 2008—LEGAL FRAMEWORKS FOR COOPERATIVE THREAT REDUCTION

ATTENDEES

NAME	ORGANIZATION
Thomas Appel	Booz Allen Hamilton
Deborah Berman	Monterey Institute for International Studies
Chris Bidwell	Defense Threat Reduction Agency
James Clark	Global Threat Reduction Initiative
Phillip Dolliff	State Department Office of Cooperative Threat Reduction
Michael Elleman	Booz Allen Hamilton
Tina Hansell	Monterey Institute for International Studies
Bill Hoehn	Government Accountability Office
Laura Holgate	Nuclear Threat Initiative
Philip Johnson	Georgetown University
David Jonas	Department of Energy, National Nuclear Security Administration
Orde Kittrie	Arizona State University
John Lauder	Areté Associates
Kenneth Luongo	State Department Bureau of Arms Control and Disarmament
Steven Saboe	State Department Nonproliferation and Disarmament Fund
Douglas Shaw	Georgetown University
Leonard Spector	Monterey Institute for International Studies

NOTES

INTRODUCTIONS -- SPECTOR, BIDWELL, SHAW, PARTICIPANTS.

Opening Comments -- Spector reviews agenda and refers to matrix distributed in participants' packets.

THE EVOLUTION OF LEGAL MODELS AT THE DEPARTMENTS OF DEFENSE, ENERGY, AND STATE

Laura Holgate: Holgate said her comments would focus on three areas: Congressional guidance, the Department of Defense and its partners overseas, and implementation of the CTR program.

Phase 1 took place between 1992 and 1995 and was focused on the four states of the former Soviet Union with nuclear weapons on their soil, Russia, Belarus, Kazakhstan, and Ukraine. Originally the program was seen as a stopgap initiative, a quick effort. At this point, there were no new funds provided to the Defense Department, which was required to transfer funds from other programs, subject to congressional approval. Congress provided a specific list of permitted activities and when funds were proposed to be expended, DoD was required to certify that the planned work was within a specifically authorized area.

Bilaterally, CTR required umbrella agreements, under which individual implementing agreements for specific subprograms were then developed. The umbrella agreements covered the four difficult issues: taxation, liability, inspection and audit, and privileges and immunities. DoD sought to ensure that the agreements were consistent across all four of the former Soviet states. Strategic Offensive Arms Elimination was in the initial phase, as was weapons security and fissile material storage. As the program began, US and foreign officials would sit down and effectively shop from the GSA catalog. US contractors were hired to do the work. DoD also moved funds to the State Department and the Department of Energy.

Phase 2 was a period of consolidation between 1995 and 2000. The CTR program was now an integral part of the overall DoD mission, and it was permitted to create lasting structures and multiyear projects. There were big fights on Capitol Hill over whether to fund the program at all, but this was eventually solved by the use of reporting requirements, as a compromise. Budgets at this juncture were developed from the bottom up and identified to specific projects, a step that made for more precise budgeting, but that also constrained the ability to transfer funds among projects, as the budgets became line items that could not be changed. Given that contracts often took three years to get into place, the inability to transfer funds to meet new contingencies was a significant constraint on program flexibility.

At this point the Department of Energy and the Department of State began to seek their own independent budgets. This brought the Nunn-Lugar program, broadly defined, from $400 million to one billion. Also during this period, however, DoD's authority was shrinking. It no longer was authorized to work on officer housing or on defense conversion. It also confronted the long tail of funding, which resulted in uncosted balances. This led the Congress to make DoD funding

three-year funding, in comparison to the no-year funding the program had previously received. There were also very demanding reporting requirements; indeed these were "overwhelming." Another challenge was that, as the scale of activities grew, it became necessary to constantly modify bilateral agreements for new dollar levels and also, as time went on, when the names of partner organizations in the host state changed because of reorganizations.

During this second phase there were also changes in Russian treaty law. The CTR umbrella agreement entered into force provisionally, but remained in this limbo status for a long time before it was ratified on the Russian side. During this time, access also became a big issue but it was of greatest concern at the Department of Energy. Then came the need to renew the umbrella agreements, which meant revisiting all the controversial issues. During this phase there are also new agreements signed with Moldova regarding MIG aircraft and with Georgia and Uzbekistan.

On the implementation front, there were reorganizations in the United States as DNS became DSWA and eventually DTRA. To enable the hiring of local contractors DTRA developed the concept of "integrating contractor," which was always a US firm, as required by Congress, but which was then able to hire locally. Indeed some locals, as they learned to work with the United States received the equivalent of a "Nunn-Lugar MBA." Procurement practices were complex, but gradually became standardized at DTRA, and a professional cadre of specialists evolved there.

Phase 3 of the CTR program, from 2000 to the present, is the period when CTR should be considered a mature program. But it is now less central to the DoD mission. It has a lower political profile both here and abroad. Congressional reporting has been rationalized. Certification requirements [e.g., the certification that Russia was compliant with all its arms control undertakings], which became a serious challenge for the program during phase 2, was addressed by permitting presidential waivers for such certifications. This created an overt mechanism that allowed the program to keep moving forward, while simultaneously showing displeasure with our partners. Previously, during the 90s the certifications would be made but it was necessary to use tortured logic.

CTR also received increased flexibility to move funds among programs, and it was given a mandate to begin work in new locations. But there were crises, as umbrella agreements had to be renewed in all four countries; in addition, US relations with Belarus collapsed. Also, there was no bio umbrella agreement with Russia. New umbrella agreements were signed with Azerbaijan and Armenia and Albania, and "WMD agreements" were signed with additional countries. Five CTRICs – CTR integrating contractors -- were prequalified to bid on specific projects, which increased efficiency, and workarounds were developed regarding auditing and transparency. Sustainment became a new issue of concern.

Given the crisis over Georgia is necessary to re-baseline the program. There will be a temptation for Congress to "take hostages," that is to restrict the CTR program with Russia because of its behavior on the Georgia issue.

With regard to new countries and regions, new agreements will be needed. But umbrella agreements are usually associated with assistance [implication is that if a different style of engagement is involved, the classic umbrella agreements may not be needed]. A new style of agreement may be possible, as the US relationship with the host country changes from assistance to partnership, as is planned in the case of Russia. Separately, some agencies within foreign governments are very opposed to some of the conditions that are found in umbrella agreements, such as the requirement that assistance not be subject to tax. These other agencies often do not see the benefits of the CTR program directly and see themselves as just finished because their focus is on generating revenue, etc. This interagency problem is compounded because of various agency reorganizations and the need to constantly change umbrella agreements.

Also needed is a more responsive contracting process. It now takes three years between the time that a project is identified and a contract providing funds for the project can be put in place. There should be ways to improve mechanisms to address these challenges.

Third-party participation is another area needing attention, specifically, how third parties like the Nuclear Threat Initiative or private businesses can receive the protections of the bilateral agreements. The Anti-Deficiency Act has been interpreted to place restrictions on the DoD receiving private funds because this would breach the limits placed by Congress on the amount

of funds to be expended by a particular program. It is not clear if this is an authoritative interpretation of the law or merely one that has been adopted as a matter of policy.

The Federal Acquisition Regulations (FAR) are also a factor that slows things down. They are useful, however, in that they permit US negotiators to state that they simply are unable to agree to certain proposals, which might otherwise lead US funds to be misspent, because of prohibitions in US law. Nonetheless there should be a way to find additional flexibility so as to speed the contracting process.

Weber: As the program evolved, we began to place expectations as to what we expected from our partners into our umbrella agreements. For example, we would write that if we built a BSL-3 lab for a host government, the host would have to agree to consolidate its pathogen strains in the facility and/or to transfer those strains to the United States. We developed Joint Requirements Implementation Plans as part of this effort.

Luongo: Starting from the general and going to the more specific, DOE is now the biggest funder of these programs and has built extensive support for them. State, however, is the most flexible.

In 1993 only DoD had funds. (Initially DoD funded CTR programs out of its existing budget, it wasn't until 1993 that Congress approved $750 million annually for CTR and all the funds went to DoD). The Department of Energy did not have support for fissile material protection programs. In 1992 Admiral Watkins met with the directors of the national labs and authorized them to discuss fissile material protection and other subjects with their Russian counterparts. In 1993, fissile material discussions ensued, but there was no access to sites within Russia. The Department of Energy took a bottom-up approach. At the time, it was very difficult inside of the US government to obtain support; DOE was perceived as assisting DoD. State thought it was the negotiator for the United States government. But the Department of Energy needed to obtain its own funds and negotiate its own agreements. . In the spring of 1994, finally, the Department of Energy received authority to press ahead with talks on fissile material protection, with a budget of $2 million.

Developments in the host country were also very important: after Yeltsin's decree requiring protection of fissile material in Russia, Minatom became more flexible. (Once Yeltsin gave Minatom the responsibility to secure fissile materials, a partnership with its US counterpart, DOE, became obvious and launched the departments full-scale involvement in CTR efforts). In the summer of 1994, new stories were published regarding nuclear smuggling, which also had an impact on Russian attitudes. Thus, politics can change the legal issues. There is a continuum and all are linked together.

In 1994, we also undertook an exchange of visits with the Russians, with American specialists going to Mayak and Russians going to Hanford. These informal steps laid the groundwork for the DOE effort in Russia. We also increased pressure on Minatom by working with the Kurchatov Institute. Much effort was expended to work out a plan to do a demonstration project there. Once that happened at the floodgates opened. All of this was "unlegal," that is, it was based on personal dialogue, not formal government-to-government agreements. 60 kg of HEU were in a locker in one building, and we provided a model security system to protect it.

Another factor we used to drive the process was the Gore-Chernomyrdin meetings, where deliverables were essential. Thus by December 1994, the first US project for the protection of fissile material in Russia was announced, at Kurchatov. Once it was set up specialists from other Russian institutes came to observe the facility. Sarov and other sites saw that new ideas were given credibility.

But for fiscal year 1995 there were no funds for DOE and so we went to DoD. We sought $15 million in FY 95 to pay for the new work. But we were told by the DoD General Counsel that DOE would not be able to do the work the way that it wanted to, in part because of the Federal Acquisition Requirements. The result was a deadlock. Eventually the Office of Science and Technology Policy briefed President Clinton directly, and he instructed the US government to do more to address the fissile material threat. Some funds were shifted within DOE internally and some were received from DoD. But DoD did not appear to be a reliable route, and so DOE went to the Hill, and obtained dedicated funding. In doing so, DOE make clear that it might not be able to account for every dollar spent given that the situation was fluid in Russian and funds were hard to track. In fact, it was recognized that some funds might not be used for their intended

purposes [siphoned off]. Nonetheless Congress gave its approval. Thus, by FY 97, DOE was receiving $200 million.

It is worth noting some additional background. Some institutes were coming to the US labs with requests for assistance. There was also study by the Joint Atomic Energy Committee that was very influential and lent credibility to the effort to secure nuclear materials in Russia. That study urged starting with smaller less secure facilities, where the risks appeared to be greatest. This led to the development of a list of 66 facilities where fissile material security work would be undertaken (success of program was based on strategy of starting will smaller, more vulnerable facilities first and then working way up to larger installations), additional deliverables for the Gore-Chernomyrdin meetings, and an important memorandum of understanding between Minatom head Mikhailov and DOE Secretary O'Leary. That provided the authority for various parts of the Minatom to participate in the program, and we included facilities in the effort several at a time. We also included work to secure nuclear weapons for the Russian Navy.

Operations were fluid and flexible and did not have the rigidity and structure used under the DoD program. By 1997, however, the system was beginning to fray. A core of US specialist promoted the lab-to-lab approach, but at headquarters there was an appetite to rein in the labs. Nonetheless budgets continue to grow and DOE was not caught in the ideological battle on Capitol Hill, which hampered DoD. At the time, for example, one committee was proposing that Russia repay the United States in timber and natural resources for the CTR work. The Department of Energy, in contrast, was like mercury, slipping between the cracks. With political changes, however, the program became more formalized.

It is now time to re-baseline the program and wind it down by 2012. We should think about a larger NDF fund to allow initiatives like Project Sapphire. That initiative took 14 months because it was hard to get NEPA approvals and the funds necessary for transportation. We should look over the horizon now and put this into place so that it is available when needed.

We could call this the "Nonproliferation Innovation Fund," with the authority to transfer funds to other agencies built in. There would also be agreements among agencies as to who would take on which responsibilities in future cases.

The G-8 Global Partnership is like a tank, that is, it just keeps on rolling, and its direction is difficult to change. We should think in terms of a "Multilateral Ready Reserve Force." This should not simply be like CTR, but should be more expansive with an increased focus on biological weapon issues. (Problem with bio-threat is knowing whether a lab and its capabilities has been completely shut down. Also, what happens to the agents/viral strains, etc? Do we bring them back to the US?)

Spector: After Ken left, the program continued to grow to $250 million. Russia insisted, however, that it be brought under a government-to-government agreement for which negotiations proved difficult, especially for the big four issues. Eventually it was not possible to complete a stand-alone DOE-Minatom agreement on material protection, and it was decided that the DOE work would be brought under the CTR umbrella agreement.

Dolliff: The State Department-sponsored Science Centers were established via an intergovernmental agreement between the host countries (Russia and the Ukraine) and the foreign funders. State's approach was less formal than that of DoD, because we needed more modest protections, since implementation would be through a multilateral organization, which would be exempt from taxation. Through the 1990s, there were no significant issues regarding implementation, although the VAT is a problem in virtually all programs, which have to "claw back" taxes paid from agencies that are not necessarily attuned to the assistance program at issue.

Access at some sensitive institutions was a problem. There are no formal rules for permitting access at bio facilities, for example, in contrast to the well-established rules in the nuclear cities. By 2001-2002 the Science Centers began to focus on commercialization and graduation. Then 9/11 upended matters and the program became threat driven, with a focus on counter-terrorism. State was also asked to take on working with Libyan and Iraqi scientists. This work started through the NDF, but then State obtained legal authority to go worldwide with a scientist engagement program. The NSC also asked State to go worldwide beginning in the area of bio security and then moving on to chemical and nuclear.

State initially sought to use formal government-to-government agreements [none was actually finalized; see notes of meeting with Dolliff], but after a searching discussion with the Office of

the Legal Adviser on the need for such agreements for the non-FSU scientist engagement and bio-security programs, it was agreed that existing agreements were sufficient to cover these efforts. Unlike the Science Centers which make grants, the worldwide program was focused more on providing training and modest quantities of security equipment, meaning that there was less focus on the transfer of funds and therefore a reduced need for formal controls. For example, the bio-security programs were working with individuals who were employed at the time, rather than those requiring stipends. The bio-security program is working in Southeast Asia, Indonesia and the Philippines. So far there have been no legal or implementation problems. Roughly 60% of expenditures by the State Department are outside of the former Soviet Union. (& 86% of actual on the ground operations outside of FSU)

Saboe: The Nonproliferation and Disarmament Fund had considerable difficulties at the beginning but, in the 16 years since that time, the program gradually found its footing and sustained funding support. Now, however, storm clouds may be on the horizon because of the international financial crisis, which will place big pressure on foreign assistance. In addition, relations are changing with the Russian Federation. So we *do* need a new baseline.

The ability to act swiftly is essential for US cooperative nonproliferation and demilitarization programs. As part of this, not only NDF, but also other agencies around the government need contingency funds to deal with emergencies that arise between budgetary cycles. Five years to get a program operating is simply too long in places like the Middle East, a period during which several governments can come and go. In Yugoslavia, to cite another example, Secretary Powell wanted immediate action to remove the HEU fuel from Vinca.

State's logistical capabilities overseas are also worth noting. State is operating via China to bring goods into North Korea to support disablement of the Yongbyon complex. DOE is doing the heavy lifting at the site. In fact 60 percent of NDF funds are front-ending for DOE, which accounts for nearly two thirds of our activities.

We don't need new legal authorities, but we do need mechanisms to improve the ability of various agencies to work together.

Broadly speaking, threat reduction is best arranged through contracting rather than through treaties. Dubai and Singapore understand contracting. In Libya, we were willing to waive anti-Israel sanctions to enable us to remove centrifuges. By now, State's nonproliferation efforts reflect considerable growth and run a quarter of $1 billion annually. Previously, annual expenditures were less than $50 million but North Korea has changed that. Currently State is spending $100 million on the effort, and the Department of Energy, $700 million. (To do so DOE needed a waiver from the Glenn Amendment.)

In the future, we will need to watch our profile. We need to lower our presence and work more actively with other countries to give us political cover. DTRA has a higher profile, which will make it harder to sustain the CTR effort in Russia after it completes the Strategic Offensive Arms Elimination Program. CTR needs to hide a bit, for example in the Middle East or North Korea, where having uniformed actors can cause a backlash.

NDF has no diplomatic protection, no indemnification, and our folks are at risk. This is accepted as part of work for the State Department, but the military and the national labs expect greater protections.

As noted, we need to have uncommitted resources and flexible authorities and operating procedures. We should be able to move money to different agencies so that we can take advantage of working through military or intelligence channels.

Clark: GTRI has a number of major facets, one of which is repatriating Soviet-origin high enriched uranium fuel to Russia, from Soviet-designed reactors in Libya, for example, and 21 other countries. In this case, we had to consider whether to go for a government-to-government agreement, which we knew would take three to four years. At the same time, there was a programmatic imperative to get things moving quickly.

So, what we did was to negotiate a bilateral agreement but without the "big four" controversial provisions, (concerning liability, taxation, inspection and audit, and privileges and immunities). We then structured the program so that we did not need these protections. No funds would be provided directly to Russia, and no US boots would be on the ground there to support program

activities. But we did need guarantees that if certain conditions were met in the host country, Russia would accept the fuel.

This resulted in a much quicker negotiation. The conditions regarding fuel were that the host country agreed to shut down or convert the reactor in question to use low enriched uranium fuel. DOE pays for the replacement low enriched fuel and provides assistance for the conversion. We also have the job of convincing local regulators and institutes that changing from a high enriched uranium fuel is practical and safe.

We do have a suite of agreements with host countries. In these, we do need the big four. In some cases, we can come in under pre-existing CTR agreements, by arranging for a simple amendment to permit "other ministries and agencies" to conclude implementing agreements. Where there are no CTR agreements, our plan had been to partner with the DoD to press ahead with WMD umbrella agreements.

One Czech official, however, inquired why this was needed, because GTRI was not proposing a long-term program. Rather he proposed a workaround that used the Vienna Convention on Civil Liability, which channels all liability to the reactor operator. Four Eastern European countries fall in this category. In these cases we have used the exchange of diplomatic notes as the basis for our work. These diplomatic notes have two operative provisions, namely, that US assistance will be implemented in accord with the Vienna Convention and that assistance will be tax exempt. We haven't been able to use precisely the same approach within the European Union because tax exemptions must be submitted to the EU and they objected. So the Czech Republic arrangement provides that the Czechs will be responsible for taxes, that is, the host government will pay.

With regard to radiological sources, again, and we don't need a government-to-government agreement because these are not multiyear programs; we are just going in and securing the sources or removing them altogether. Here we take advantage of the Convention for Assistance in the Event of Radiological Accidents. It deals with liability, privileges and immunities, and taxation, although it has an opt-out provision. If the host country has opted out, we use diplomatic notes under which it agrees to apply these provisions.

Kittrie: Question – Have there been any costs to these workarounds or was their effectiveness hindered?

Clark: No, our thinking changed, and we recognize that the government-to-government agreement approach wouldn't work. So we rethought where the locus of exposure resided. If we were only sending in experts, we realized that there was not much risk of liability and in terms of equipment only casks were involved. By the process of elimination, we developed the alternative approach.

Kittrie: When using contracts, have you had problems in forgoing the big four protections?

Saboe: No, there have been no actual problems.

Holgate: In dealing with Kazatomprom, we obtained liability protection in Kazakhstan and they agreed to pay taxes, so an *exemption* from taxation was not needed.

Kittrie: But with whom are these contracts made? Even if they are made with government agencies, they cannot prevent the court system of the host country from hearing suits from private individuals for damages incurred by US operations in that country.

Saboe: we have contracted with agencies, rather than private entities in the host country. We also have sovereign immunity as a defense that we can fall back on if liability issues result in lawsuits. We also arrange for contractors to take out liability insurance through for example Lloyd's of London.

Kittrie: That still does not prevent civil suits in court, has this just not been a problem?

Laura Holgate: The contracts with foreign government agencies are reinforced by regulatory decisions made by those agencies pursuant to the contracts. Perhaps these arrangements do not eliminate legal cause of action in civil cases but such suits simply have never arisen. (Saboe agreed).

Kittrie: What restrictions and federal law currently constrain DTRA? First, it has received authority to operate outside of the former Soviet Union. This authority was first granted in the FY 04 authorization, which stated that in an emergency DoD was permitted to use funds there. In the FY 08 authorization requirement that there be an emergency was removed, however it still was not possible to use DoD funds in settings where certain sanctions were applicable. This required a waiver of the Glenn amendment by the president. (The amendment has already been waived with respect to South Asia.)

Are there other countries where sanctions laws are unwaivable? The Senate Armed Services Committee staff is skeptical that this is the case. Direct assistance is barred to Iran, but it is not clear that this applies to the CTR program. As for the importation of a weapon design, the Glenn amendment would be waivable.

Senator Lugar has proposed granting CTR notwithstanding authority comparable to that accorded NDF and the Carter-Joseph Report also recommended this. But the Senate Armed Services Committee staff has asked whether there is any country for which this be necessary, in fact? The staff has said it will consider such authority when an actual case arises. We need to undertake a systematic analysis of where, in practical terms, CTR activities would be barred by existing sanctions laws that could not be waived. This would enable us to get the necessary authority in place now, so that this could be available later if needed, a position supported by Senator Lugar's staff.

Spector: DoD has said that it cannot act in states that are on the list of state sponsors of terrorism or that are considered to be gross human rights violators.

Kittrie: I was not aware of this problem. It was not raised by the Senate Armed Services Committee. [Spector subsequently checked notes of phone interviews; a State Department attorney stated that DoD could not operate in states on the terrorism list or that were gross violators of human rights.]

Holgate: Will notwithstanding authority allow you to get around environmental laws that might restrict, for example, the return to the United States of radioactive material from abroad?

Kittrie: Re: CTR umbrella agreements, the one with Russia was extended for seven years on June 19, 2006. Included the big four issues. But it will need further extension in 2013. Access problems are continuing, as well, in particular, at Mayak to confirm that the facility is being used for its stated purpose of housing fissile material. A CTR government-to-government agreement may not be needed elsewhere, however. Thus, again, a systematic review is needed to see if alternatives might work.

Another area needing attention is the authority to commingle funds from other governments. DOE can accept and commingle funds especially from the G-8 Global Partnership. The Senate Armed Services Committee staff states that DoD never requested this and that the committee would not make a change unless it could observe why it might be needed, that is, it would need to be shown a case of a country that is now unable to contribute to the CTR effort.

The National Defense Authorization Act for FY 2005 permits DOE to commingle funds for three activities: the elimination of plutonium production program; GTRI; Second Line of Defense. The only restriction is that the funds once received must be used for the identified purpose; there is also an annual report required. The funds stay in DOE's account at Treasury.

Luongo: Our funds subject to US laws? To donor state laws?

Jonas: At the Department of Energy those funds are treated as appropriated funds.

Clark: Typically, at the beginning, states had very specific requests for projects that they wanted to contribute toward. Canada, for example, wanted to remove 10 RTG's from Russia; Ukraine wanted to equip a particular border post. But by now states are becoming less specific and prepared to contribute to the program overall.

Hoehn: Are there actual activities left to contribute to under CTR in Russia, or is the job now virtually done? If there are no such activities, why is commingling an issue.

Appel: Canada was seeking to donate funds to CTR only two weeks ago, so this appears to be a genuine issue.

Lauder: Comment-To make a long and complicated discussion short, it seems there may be potential legal obstacles for other states and NGOs like NTI to assist in CTR operations but so far these actors have been able to help out when they are willing?

(General agreement from participants)

Luongo: We need to intensify our focus on biological weapons and bio security. And that means bringing in additional agencies, in particular, the Department of Health and Human Services and the National Institutes of Health.

APPENDIX 3

JANUARY 27, 2009 – PREVENTIVE WAR: DO WEAPONS OF MASS DESTRUCTION CHANGE THE RULES?

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PANELIST PAPER I:INTERNATIONAL LAW AND THE PREEMPTIVE USE OF MILITARY FORCE -*ANTHONY CLARK AREND*

The Washington Quarterly • 26:2 pp. 89–103.
THE WASHINGTON QUARTERLY--SPRING 2003 **89**

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In the wake of the tragic events of September 11, 2001, and a perceived threat from Iraq, the Bush administration promulgated a new national security strategy.[1] One critical element of this strategy is the concept of preemption—the use of military force in advance of a first use of force by the enemy. Long a contentious doctrine under international law, the claim to use preemptive force has been taken to an even more controversial level by the administration. Although traditional international law required there to be "an imminent danger of attack" before

preemption would be permissible, the administration argues in its 2002 National Security Strategy (NSS) that the United States "must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."[2] It contends that "[t]he greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory

action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack."[3] Is this more permissive approach to preemption acceptable under current

international law? The answer to this question depends on how one understands the contours of contemporary international law. Under the United Nations Charter paradigm for the use of force, unilateral preemptive force without an imminent threat is clearly unlawful. But if the charter framework no longer accurately reflects existing international law, then the Bush doctrine of preemption may, in fact, be lawful—even if it is politically unwise. This article will assess the lawfulness of the Bush doctrine and then seek to make several policy recommendations in light

of international law.

International law is created through the consent of states. States express this consent by two basic methods: treaties and custom. Treaties are written agreements between states; in effect, they are the international equivalent of contracts. Bilateral treaties are concluded between two states, such as the Strategic Arms Reduction Treaty between the United States and Russia; and multilateral treaties are negotiated among many states, such as the UN Charter. Customary international law is different. Unlike treaties, customary international law is not created by what states put down in writing but, rather, by what states do in practice. In order for there to be a rule of customary international law, there must be an authoritative state practice. In order words,

states must engage in a particular activity and believe that such activity is required by law. Diplomatic immunity, for example, began as a rule of customary international law before it was ultimately codified in a treaty. Centuries ago, states began the practice of granting diplomats immunity from local jurisdiction for a variety of pragmatic reasons: they did not wish to cut off a channel of communication; they feared that, if they arrested diplomats of a foreign state, the foreign state would do the same to their diplomats; and so on. As time passed, more and more states began to grant immunity until virtually all states in the international system were giving diplomats immunity.

Gradually, these states that had originally begun granting immunity for largely practical reasons came to believe that granting such immunity was required by law. At that point, there was a rule of customary international law—when there was both a near-universal practice and a belief that the practice was required by law. Under the regime of customary international law that developed long before the UN Charter was adopted, it was generally accepted that preemptive force was permissible in self-defense. There was, in other words, an accepted

doctrine of anticipatory self-defense. The classic case that articulated this doctrine is the oft-cited *Caroline* incident. During the first part of the nineteenth century, an anti-British insurrection was taking place in Canada. At the time, Canada was under British rule while the United States and Great Britain were in a state of peace. There was, however, a ship owned by U.S. nationals, the *Caroline*, that was allegedly providing assistance to the rebels in Canada. On the night of

December 29, 1837, while the ship was moored on the U.S. side of the Niagara River, British troops crossed the river, boarded the ship, killed several U.S. nationals, set the ship on fire, and sent the vessel over Niagara Falls. The British claimed that they were acting in self-defense, but after some heated exchanges with Secretary of State Daniel Webster, the British government ultimately apologized. Nonetheless, over the course of diplomatic communications between the Americans and the British, two criteria for permissible self-defense—including preemptive self-defense—were articulated: necessity and proportionality.

First, the state seeking to exercise force in self-defense would need to demonstrate necessity. As Webster explained in a letter to Lord Ashburton, a special British representative to Washington, the state would have to demonstrate that the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation." In other words, the state would need to show that the use of force by the other state was imminent and that there was essentially nothing but forcible action that would forestall such attack. Second, the state using force in self-defense would be obliged to respond in a manner proportionate to the threat. In making the argument to the British, Webster explained that, in order for Canada's action to be permissible, it would be necessary to prove that "the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[5] Throughout the pre–UN Charter period, scholars generally held that these two criteria set the standard for permissible preemptive action. If a state could demonstrate necessity—that another state was about to engage in an armed attack—and act proportionately, preemptive self-defense would be legal.

THE EFFECT OF THE UN CHARTER

As the Second World War was coming to an end, the delegates from 51 states assembled in San Francisco in the spring of 1945 to draft the charter of the new global organization. Pledging to "save succeeding generations from the scourge of war,"[6] the framers of the UN Charter sought to establish a normative order that would severely restrict the resort to force. Under Article 2(4) of the charter, states were to "refrain in their international relations from the threat or use of force

against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations." In the charter, there were only two explicit exceptions to this prohibition: force authorized by the Security Council and force in self-defense. Under Article 39, the council is empowered to determine if there is a "threat to the peace, breach of the peace, or act of aggression." If the Security Council so determines, it can authorize the use of force against the offending state under Article 42.

The critical provision relating to the other exception, self-defense, is Article 51, which provides in part:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Although the basic contours of Article 51 seem straightforward, its effect on the customary right of anticipatory self-defense is unclear. If one reviews the scholarly literature on this provision, writers seem to be divided into two camps. On one hand, some commentators—"restrictionists" we might call them—claim that the intent of Article 51 was explicitly to limit the use of force in self-defense to those circumstances in which an armed attack has actually occurred. Under this logic, it would be unlawful to engage in any kind of preemptive actions. A would-be victim would first have to become an actual victim before it would be able to use military force in self-defense. Even though Article 51 refers to an "inherent right" of self-defense, restrictionists would argue that, under the charter, that inherent right could now be exercised only following a clear, armed attack.

Other scholars, however, would reject this interpretation. These "counterrestrictionists" would claim that the intent of the charter was not to restrict the preexisting customary right of anticipatory self-defense. Although the arguments of specific counter-restrictionists vary, a

typical counter-restrictionist claim would be that the reference in Article 51 to an "inherent right" indicates that the charter's framers intended for a continuation of the broad pre–UN Charter customary right of anticipatory self-defense. The occurrence of an "armed attack" was just one circumstance that would empower the aggrieved state to act in self-defense. As the U.S. judge on the International Court of Justice (ICJ), Stephen Schwebel, noted in his dissent in *Nicaragua v. U.S.*, Article 51 does not say "if, and only if, an armed attack occurs."[7] It does not explicitly limit the exercise of self-defense to only the circumstance in which an armed attack has occurred.

Unfortunately, despite Schwebel's willingness to express his views on anticipatory self-defense, neither the ICJ nor the UN Security Council has authoritatively determined the precise meaning of Article 51. Indeed, in the *Nicaragua* case, the ICJ made a point of noting that, because "the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised … the Court expresses no view on the issue."[8] As a consequence, the language of the charter clearly admits of two interpretations about the permissibility of preemptive force. Given this state of affairs, it is logical to explore the practice of states in the period after the charter was adopted to determine if recent customary international law has either helped supply meaning to the ambiguous language of Article 51 or given rise to a new rule of customary international law in its own right that would allow for preemptive action.

POST–UN CHARTER STATE PRACTICE

As noted earlier, international law is created through the consent of states. Behind this understanding is the assumption that states are sovereign and, accordingly, can be bound by no higher law without their consent. As a consequence, states can lawfully do as they please unless they have consented to a specific rule that restricts their behavior. As the Permanent Court of International Justice, the predecessor of the current ICJ, noted in the *Lotus* case: International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[9]

This consent-based conception of international law, or positivism, as it is called, has

critical significance for an examination of post–UN Charter practice regarding the preemptive use of force. Given that the charter is sufficiently ambiguous on this question and that there was a preexisting rule of customary international law allowing for anticipatory self-defense, it is not necessary to establish that a customary rule has emerged to permit states to use force preemptively in order for such use of force to be lawful. On the contrary, it is necessary rather to establish that there is no rule prohibiting states from using force preemptively. If states are sovereign, under the logic of the *Lotus* case, they can do as they choose unless they have consented to a rule restricting their behavior.

Although there are undoubtedly many ways to explore state practice relating to preemption in the post–UN Charter world, perhaps one of the most useful is to examine debates in the Security Council in cases where questions of preemptive force were raised. Since the charter was adopted, debate has ensued about the efficacy of preemption in three major cases: the 1962 Cuban missile crisis, the 1967 Six-Day War, and the 1981 Israeli attack on the Osirak reactor in Iraq.[10]

THE CUBAN MISSILE CRISIS (1962)

During the Cuban missile crisis, the United States made a number of formal legal arguments in support of the institution of a "defensive quarantine" in advance of any actual Soviet or Cuban use of force. Most of these official arguments revolved around the role of regional organizations and their ability to authorize force absent a Security Council authorization. Nonetheless, during the course of council discussion of the quarantine, a number of Security Council representatives spoke about preemption. Although there was no clear consensus in support of such a doctrine, there was also no clear consensus opposing it. Indeed, even several states that argued against the U.S. position seemed not so much to reject a doctrine of preemption as to question whether the criteria established under customary law were met in this case.

The delegate from Ghana, for example, asked, "Are there grounds for the argument that such action is justified in exercise of the inherent right of self-defense? Can it be contended that there was, in the words of a former American Secretary of State whose reputation as a jurist in this field is widely accepted, 'a necessity of self-defense, instant, overwhelming, leaving no

choice of means and no moment for deliberation'?"[11] Then, he responded to these questions:

> *"My delegation does not think so, for as I have said earlier, incontrovertible proof is not yet available as to the offensive character of military developments in Cuba. Nor can it be argued that the threat was of such a nature as to warrant action on the scale so far taken, prior to a reference to this Council."[12] In essence, the delegate was accepting the notion that anticipatory self-defense would be permissible if the criterion of necessity were met. In this case, he concluded that that requirement was not met.*

THE SIX-DAY WAR (1967)

On June 5, 1967, Israel launched military action against the United Arab Republic and quickly won what came to be called the Six-Day War. During It is difficult to conclude that preemptive force in self-defense is prohibited. In the course of the Security Council debates, Israel ultimately argued that it was acting in anticipation of what it believed would be an imminent attack by Arab states. Not surprisingly, support for Israel tended to fall along predictable political lines. The Soviet Union, Syria, and Morocco all spoke against Israel. Interestingly enough, those states arguing against Israel tended to claim that the first use of force was decisive, seemingly rejecting any doctrine of anticipatory self-defense. Supporters of Israel, such as the United States and the United Kingdom, on the other hand, tended to refrain from asserting a doctrine of preemption. Unlike the Cuban missile crisis debates, there seemed to be more speakers who were negatively disposed to anticipatory self-defense; but again, there was no clear consensus opposed to the doctrine.

THE ATTACK ON THE OSIRAK REACTOR (1981)

Israel was once again the object of criticism in 1981, when it used force to destroy an Iraqi reactor that Israel claimed would be producing nuclear weapons–grade material for the purpose of constructing nuclear weapons that would be used against Israel. As in 1967, Israel claimed that it was acting in anticipatory self-defense. Israeli ambassador Yehuda Blum asserted that "Israel was exercising its inherent and natural right of self-defense, as understood in general international law and well within the meaning of Article 51 of the [UN] Charter."[13] A number of delegations spoke against Israel, with several taking a restrictionist approach to Article 51, including Syria, Guyana, Pakistan, Spain, and Yugoslavia.

Yet, other states that argued against Israel's action took a counter-restrictionist approach. They supported the lawfulness of anticipatory self-defense but believed that Israel had failed to meet the necessity requirement. The Sierra Leonean delegate, for example, claimed that "the plea of self-defence is untenable where no armed attack has taken place *or is imminent*."[14] Quoting from Webster's letter in the *Caroline* case, he explained that "[a]s for the principle of self-defence, it has long been accepted that, for it to be invoked or justified, the necessity for action must be instant, overwhelming and leaving no choice of means and no moment for deliberation."[15] "The Israeli action," he continued, "was carried out in pursuance of policies long considered and prepared and was plainly an act of aggression."[16]

Similarly, the British representative to the Security Council, Sir Anthony Parsons, explained, "It has been argued that the Israeli attack was an act of self-defence. But it was not a response to an armed attack on Israel by Iraq. There was no instant or overwhelming necessity for self-defence. Nor can it be justified as a forcible measure of self-protection. The Israeli intervention amounted to a use of force which cannot find a place in international law or in the Charter and which violated the sovereignty of Iraq."[17] Delegates from Uganda, Niger, and Malaysia tended to take a similar approach.

Interestingly enough, the U.S. ambassador to the UN, Jeane Kirkpatrick, while speaking against the Israeli action, did not explicitly rely upon the doctrine of anticipatory self-defense. Although the Security Council ended up censuring Israel for its action, the most notable aspect of this debate was the willingness to engage in a discussion of the concept of preemptive self-defense. Even though there was no clear consensus in support of the doctrine, there did seem to be greater support than in previous cases—provided that the *Caroline* criteria are met.

EVALUATION OF POST–UN CHARTER PRACTICE

Given this brief examination of some important indicators of state practice in the post–UN Charter period, it would be difficult to conclude that there is an established rule of customary international law prohibiting the preemptive use of force when undertaken in anticipatory self-defense. If anything, there seems to have been greater support for the doctrine in the most recent case. In all the discussions, however, those who supported the doctrine of anticipatory self-defense continued to claim that the right is limited by the requirements of necessity and

proportionality set out in the *Caroline* case.

THE BUSH DOCTRINE AND THE LAW

In light of this examination of international law, it is fairly unremarkable for a U.S. administration to assert a doctrine of preemption. What makes the Bush doctrine different is that it seeks to relax the traditional requirement of necessity. As noted earlier, the 2002 NSS specifically claims that "[w]e must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries." It argues that "[t]he greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack." In other words, the administration is contending that, because of the new threat posed by weapons of mass destruction (WMD) and terrorists, the old requirement of necessity may not always make sense. By the time imminent WMD use has been established, it may be too late to take any kind of successful preemptive action. Although traditional international law would not require certainty regarding time and place, it would suggest near certainty. If an attack is imminent, it is nearly certain that the attack will occur. Given this conclusion, many scholars would be tempted to say that the Bush doctrine is clearly at variance with international law, but is this necessarily the case?

The preceding discussion presupposes two things about the nature of international law. First, it assumes that the threat posed by WMD and terrorism are similar to the threats to use force that existed as the law relating to anticipatory self-defense was developing historically. Second, the discussion assumes that the UN Charter framework for the recourse to force constitutes the existing legal paradigm. I would argue that both these assumptions are not correct.

THE CHANGED NATURE OF THE THREAT: WMD AND TERRORISM

As international law relating to the recourse to force developed over the centuries and culminated in the UN Charter, the main purpose of the law was to address conventional threats posed by conventional actors: states. Both WMD and terrorism pose threats unanticipated by traditional international law. When the charter was adopted in 1945, its

framers sought to prevent the types of conflict that had precipitated World War II—

circumstances in which regular armies engaged in clear, overt acts of aggression against other states.

As a consequence, Article 2(4) prohibits the threat and use of force by states against states, and Article 51 acknowledges a state's inherent right of self-defense if an armed attack occurs. Even if UN Charter provisions are understood in light of customary international law allowing anticipatory self-defense, the charter's focus is still on states using force the conventional way.

Neither WMD nor terrorist actors were envisioned in this framework. The three main WMD types—chemical, biological, and nuclear—could not have seriously been on the mind of the delegates while they were drafting the UN Charter. Even though chemical weapons had been used during World War I, they had not proven to be particularly militarily useful and, in

any case, were not used in any significant way as an instrument of war in World War II. The very idea of nuclear weapons was a carefully guarded secret until August 1945 and thus could not have figured into the deliberations on the charter in the spring of 1945. Indeed, as John Foster Dulles

would later observe, the UN Charter was a "pre-atomic" document.[18] Terrorism, although certainly not a recent phenomenon, was not addressed in traditional international law relating to the recourse to force.

Prior to the twentieth century, customary international law dealt with state actors. Even major multilateral treaties that related to use-of-force issues, such as the League of Nations Covenant, the Kellogg-Briand Pact of 1928, as well as the UN Charter, addressed their provisions only to states. It is precisely in this lacuna in international law that the problem lies. WMD and terrorism can strike at states in ways that customary international law did not address. Underlying international law dealing with the recourse to force is the principle that states have a right to use force to defend themselves effectively. When conventional troops prepare to commit an act of aggression, the basic criteria of *Caroline* would seem to make sense. The soon-to-be victim would still be able to mount an effective defense if it were required to wait for an armed

attack to be imminent. The soon-to-be aggressor would be taking enough overt actions, and the attack itself would require mobilization, which would give the victim enough lead time.

Both WMD and terrorism, however, are different. It can be very difficult to determine whether a state possesses WMD, and by the time its use is imminent, it could be extremely difficult for a state to mount an effective defense. Similarly, terrorists use tactics that may make it all but impossible to detect an action until it is well underway or even finished. As a consequence, it could be argued that it would make more sense to target known WMD facilities or known terrorist camps or training areas long in advance of an imminent attack if the goal is to preserve the state's right to effective self-defense. From a legal perspective, there is great difficulty with this relaxation of the *Caroline* criterion of necessity. Where does one draw the line? If imminence is no longer going to be a prerequisite for preemptive force, what is? With respect to WMD, would it be simple possession of such weapons?

Such an approach is especially problematic. Given the current realities in the international system, India would be able to use force against Pakistan, and vice versa; Iraq could target Israel; and many states could target the United States, Great Britain, France, China, and Russia. What about hostile intent as a criterion? Perhaps it could be argued that, if the state that possessed these weapons had hostile intent toward other states, this would justify preemption. But, a hostile-intent approach could be even more permissive. It could be claimed that preemptive force would be justified if a state were in the early stages of developing a nuclear weapons program—long before actual possession.[19] In a sense, Israel was making this kind of claim when it struck the Osirak reactor in 1981, but this extremely permissive approach was clearly rejected by the Security Council.

Both WMD and terrorism pose threats unanticipated by traditional international law. What would be the standard for terrorism? If there is a group such as Al Qaeda that has been committing a series of attacks against the United States, preemption is not really at issue. Rather, the United States and its allies are simply engaging in standard self-defense against an ongoing, armed attack. The problem would present itself if there were a group that had not yet committed an action but seemed likely to act at some point in the future. Short of an imminent attack, when would a state lawfully be able to preempt that group?

So, here is the difficulty. Although it is true that contemporary international law dealing with the recourse to force in self-defense does not adequately address the problem of WMD and terrorism, no clear legal standard has yet emerged to determine when preemptive force would be permissible in such cases. Some scholars have suggested standards, but it does not seem that either treaty law or custom has yet come to endorse one.

THE FAILURE OF THE CHARTER FRAMEWORK

The lack of a new standard for preemptive force may not be the greatest challenge facing international law dealing with the recourse to force. As indicated above, most scholars addressing the current status of international law dealing with the preemptive use of force would argue that the law can be understood as being embodied in the UN Charter paradigm as modified slightly by customary international law. Hence, most scholars would conclude that the use of force is prohibited unless it has been authorized by the Security Council or is undertaken in self-defense. Typically, scholars would claim that Articles 2(4) and 51 have to be read to allow for anticipatory self-defense as defined in *Caroline*, and many would argue that certain other uses of force such as force to rescue nationals and humanitarian intervention would be lawful.

Generally, however, these scholars would claim that the core of Article 2(4) is still existing international law and that the charter paradigm describes contemporary international law. Is this correct? As noted above, international law is created through the consent of states expressed through treaties and custom. Because both treaties and custom are equally the source of international law, if a conflict arises between the two, such a conflict is resolved by determining the rules to which states consent at the present time. This can be determined by ascertaining which rules currently possess two elements: authority and control. First, to have authority, the would-be rule must be perceived by states to be the law; in the traditional language of the law, the rule must have *opinio juris*. Second, the putative rule must be controlling of state behavior. It must be reflected in the actual practice of states.

When the UN Charter was adopted as a treaty in 1945, that was a clear indication that states perceived the norms embodied in that agreement to be law. In the more than 50 years that have transpired since the conclusion of the charter, however, the customary practice of states seems to be wildly at variance with the charter's language. If the charter framework intended to

prohibit the threat and use of force by states against the territorial integrity or political independence of states or in any other manner inconsistent with the purposes of the UN, such prohibition does not seem to be realized in practice. Almost since the moment that the charter was adopted, states have used force in circumstances that simply cannot be squared with the charter paradigm. Although commentators may differ on the precise uses of force that have violated the UN Charter framework, the following list would seem to represent the kinds of force that have been used against the political independence and territorial integrity of states, have not been authorized by the Security Council, and cannot be placed within any reasonable conception of self- defense: the Soviet action in Czechoslovakia (1948); the North Korean invasion of South Korea (1950); U.S. actions in Guatemala (1954); the Israeli, French, and British invasion of Egypt (1956); the Soviet invasion of Hungary (1956); the U.S.-sponsored Bay of Pigs invasion (1961); the Indian invasion of Goa (1961); the U.S. invasion of the Dominican Republic (1965); the Warsaw Pact invasion of Czechoslovakia (1968); the Arab action in the 1973 Six-Day War; North Vietnamese actions against South Vietnam (1960–1975); the Vietnamese invasion of Kampuchea (1979); the Soviet invasion of Afghanistan (1979); the Tanzanian invasion of Uganda (1979); the Argentine invasion of the Falklands (1982); the U.S. invasion of Grenada (1983); the U.S. invasion of Panama (1989); the Iraqi attack on Kuwait (1990); and the NATO/U.S. actions against Yugoslavia in the Kosovo situation (1999).[20]

One could add to this list numerous acts of intervention in domestic conflict, covert actions, and other uses of force that tend to fall below the radar screen of the international community. In short, states—including the most powerful states—have used force in violation of the basic UN Charter paradigm. Given this historical record of violations, it seems very difficult to conclude that the charter framework is truly controlling of state practice, and if it is not controlling, it cannot be considered to reflect existing international law. As Professor Mark Weisburd has noted, "[S]tate practice simply does not support the proposition that the rule of the UN Charter can be said to be a rule of customary international law."[21] "So many states have used force with such regularity in so wide a variety of situations," Professor Michael If imminence is no longer going to be a prerequisite for preemptive force, what is?

Glennon echoes, "that it can no longer be said that any customary norm of state practice

constrains the use of force."[22] Although I would argue that there is customary prohibition on the use of force for pure territorial annexation, as witnessed by the international community's reaction to the Iraqi invasion of Kuwait in 1990, such minimal prohibition is a far way from the broad language of the charter prohibition contained in Article 2(4). For all practical purposes, the UN Charter framework is dead. If this is indeed the case, then the Bush doctrine of preemption does not violate international law because the charter framework is no longer reflected in state practice.

OPTIONS FOR POLICY

Given the preceding legal discussion, what are the options for U.S. policymakers? At first blush, there seem to be three ways to proceed. First, U.S. decisionmakers could opt to accept the traditional understanding of international law. They could recognize that preemptive force is permissible in the exercise of anticipatory self-defense, but only if the imminence criterion of *Caroline* were met. This approach would have the advantage of being the least controversial approach to the law, but it would require policymakers to make the case that the use of force by an enemy state is indeed imminent before preemption would be permissible. Based on the language of the 2002 NSS, this would require the administration to back away from policy that has already been articulated. Second, policymakers could claim that, because WMD and terrorism pose a threat that was completely unanticipated in traditional international law, the law must be reinterpreted to allow for a relaxing of the imminence criterion.

This tack would be consistent with the administration's public statements. Here, the difficulty would be in establishing a new standard for preemption that would not legitimate a host of preemptive actions from a variety of other states in the international system. Third, policymakers could declare the UN Charter framework dead. They could admit that charter law is no longer authoritative and controlling. This would be the most intellectually honest approach. It would recognize the current, unfortunate state of international law and create clean ground to build anew. The disadvantages to this approach, however, are legion. If the United States were to proclaim the charter dead, many states would rejoice at the funeral and take advantage of such a lawless regime. U.S. allies, on the other hand, would be likely to condemn such a seemingly brazen rejection of multilateralism and conceivably refuse to give the United States the kind of

support it may need to continue the war against terrorism and promote order in the international system.

So, what is to be done? Although I believe that the charter paradigm does not describe contemporary international law relating to the recourse to force, I would recommend the following approach: First, the administration should accept as a matter of policy the notion that preemptive force in selfdefense should only be undertaken unilaterally if the *Caroline* criterion of imminence was met. Irrespective of the current status of international law on this question, such a policy would be less destabilizing, and it could contribute to a return to a more rule-based legal regime. Second, the administration should indicate that, as a matter of policy, the use of preemptive force should be undertaken in the absence of imminence only with the approval of the Security Council. Such a policy would ensure multilateral support for such action and would likely prevent the opening of the flood gates to unilateral preemptive action by other states. Third, the United States should acknowledge that existing international law relating to the use of force is highly problematic and seek, through the Security Council, to move toward the development of a legal regime that would be truly authoritative and controlling of state behavior. This may be a daunting task, and the United States might prefer that the law be left "in a fog," as Glennon has said. Nevertheless, if the legal regime for the recourse to force is to return to something more closely resembling a stable order, the United States—as the superpower in the international system—needs to take the lead both in acknowledging the deficiency in the current legal structure and in pointing the way to its improvement.

NOTES

1. The National Security Strategy of the United States, September 2002, www.whitehouse.gov/nsc/nss.html.
2. Ibid.
3. Ibid.
4. Letter from Mr. Webster to Lord Ashburton, August 6, 1842, cited in Lori F. Damrosch et al., *International Law: Cases and Materials* (2001), p. 923.
5. Letter from Mr. Webster to Mr. Fox, April 24, 1841, cited in Damrosch et al., *International Law: Cases and Materials* (2001).
6. UN Charter, preamble.
7. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v. U.S.*), Merits, International Court of Justice (judgment of June 27, 1986), (dissent of Judge Schwebel).
8. Ibid., (opinion of the Court) para. 194.
9. *The S.S.* Lotus, Permanent Court of International Justice (1927), P.C.I.J. Ser. A, no. 10, reprinted in

Damrosch et al., *International Law: Cases and Materials* (2001), pp. 68–69.

10. See Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge, 1993), pp. 71–79.
11. Mr. Quaison-Sackey, UN Doc. no. S/PV.1024:51 (1962).
12. Ibid.
13. Yehuda Blum, UN Doc. no. S/PV.2280, June 12, 1981, p. 16.
14. Mr. Koroma, UN Doc. no. S/PV.2283:56 (1981) (emphasis added).
15. Ibid.
16. Ibid.
17. Statement of Sir Anthony Parsons, UN Doc. no. S/PV.2282:42 (1981).
18. John Foster Dulles, "The Challenge of Our Time: Peace with Justice," *American Bar Association Journal* 38 (1953): 1066.
19. I want to thank my colleague Robert E. Cumby for suggesting this approach to me.
20. See Arend and Beck, International Law and the Use of Force, pp. 182–183.
21. A. Mark Weisburd, Use of Force: The Practice of States since World War II (Pennsylvania State Univ. Press, 1997), p. 315.
22. Michael Glennon, "The Fog of Law: Self Defense, Inherence and Incoherence in Article 51 of the United Nations Charter," *Harvard Journal of Law and Public Policy*
23. (2002): 539, 554.

PANELIST PAPER 2:THE DOCTRINE OF PREEMPTIVE SELF-DEFENSE

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50 Villanova Law Review 699 (2005)

I. INTRODUCTION

An enduring reality demonstrated by the terrorist attacks of September 11,2001 is that non-state actors are capable of projecting extreme violence across the globe. The September 11 attackers were a variety of individuals who were trained and recruited across multiple states, who were instructed and funded by a loose but sophisticated al Qaeda network, and who then surreptitiously acquired the means to unleash a vicious attack that within a matter of hours killed more than three thousand people, mostly civilians.[1]

This ability of non-state actors to project force across the globe is particularly troubling in the context of their potential use of weapons of mass destruction ("WMD"). Although governments have possessed WMD for many decades, such weapons have rarely been used, largely because of the understanding by states that the use of WMD against another state would almost certainly lead to general, worldwide condemnation and possibly a response in kind. Such notions of inter-state deterrence and reciprocity, however, are far less apparent with respect to relations between a state and a non-state actor engaged in terrorist behavior, especially if the non-state actor is not seeking broad sympathy for its cause. A terrorist organization may well believe that responsibility for a WMD attack could be concealed from the attacked state, or believe that the attacked state could not effectively respond against an amorphous non-state network. Thus, were such a network able to obtain WMD-- whether in the form of biological, chemical or nuclear weapons--there may be little incentive not to use them.

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* My thanks to the Fletcher School of Tufts University for the opportunity to present an earlier version of this paper, and to José Arvelo-Vélez for both thoughtful insights and invaluable research assistance.

T-2 Acquisition of WMD by non-state actors may be difficult, but is not impossible. Large stocks

of Russian plutonium from dismantled weapons are vulnerable to theft and sale on the black market.[2] Infectious organisms suitable for bioterrorist use are available for commercial sale; some twenty-five such organisms can even be obtained from natural sources, such as infected animals or, in the case of anthrax, the soil.

[3] The possibility of an attack by terrorists using chemical weapons was vividly demonstrated in March 1995 in Tokyo, Japan, when a religious cult released a form of sarin nerve gas in Tokyo's subway system during morning rush hour, killing twelve and injuring more than five thousand people.[4] Once WMD are acquired, transporting them across the globe is also difficult, but not impossible. The United States has 14,000 small airports and 95,000 miles of unprotected coastline; of the some 16 million cargo containers that reach U.S. shores each year, only five percent are inspected.

[5] The idea that an organization such as al Qaeda may obtain a WMD, smuggle it into the United States on board a container ship and then release or detonate it in a major U.S. city, strikes many analysts as not so much a question of "if" as it is a question of "when."

The realities of the post-September 11 period led the Bush Administration in 2002 to articulate, in very strong and public terms, a doctrine of "preemptive self-defense." Among other things, the doctrine asserted an evolved right under international law for the United States to use military force "preemptively" against the threat posed by "rogue states" or terrorists who possess WMD.[7] According to the Bush Administration:

> *For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat -- most often a visible mobilization of armies, navies, and air forces preparing to attack.*
>
> *We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction--weapons that can be easily concealed, delivered covertly, and used without warning.*

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction--and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.[8] Although the Bush Administration articulated the doctrine, acceptance of the doctrine within the U.S. government appears widespread. In the joint resolution enacted by Congress to authorize the use of force against Iraq in 2002-2003, Congress found:

> *Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself."*[9]

Asked about this issue during the 2004 presidential campaign, the nominee for the Democratic Party endorsed the doctrine.[10]

Compliance with international law on the use of armed force presents extraordinary problems, for such law implicates core national security interests of states (the same phenomenon may be seen in disputes over the war power in U.S. constitutional law). Nevertheless, policy-makers must pay attention to whether a particular act of "preemptive self-defense" would likely be regarded as violating international law, because there may be significant political, economic, and military repercussions, as discussed in Part II.[11] To date, however, no authoritative decision-maker within the international community has taken a position on whether preemptive self-defense is permissible under international law, or whether it is permissible but only under certain conditions. The judicial wing of the United Nations, the International Court of Justice ("ICJ"), has not passed upon a case or issued an advisory opinion on preemptive self-defense.

In the Military and Paramilitary Activities in and against Nicaragua[12] case ("Nicaragua case"), the ICJ advanced important interpretations regarding the status of law on the use of force, but the ICJ went out of its way to state expressly that it took no view on "the lawfulness of a response to

the imminent threat of an armed attack."[13] The U.N. Security Council, charged with maintaining peace and security, has issued no resolution expressly condemning or approving of preemptive self-defense, although it has issued important decisions that relate to the issue. Consequently, states and scholars are left arguing its legality based principally on their interpretation of the meaning of the U.N. Charter and on state practice since the Charter's enactment in 1945. As discussed in Part III, international lawyers (whether government attorneys, other practitioners or academics) have taken very different views regarding the legality of preemptive self-defense, and their views might be seen as falling into four basic schools of thought: the strict constructionist school, the imminent threat school, the qualitative threat school and the "charter is dead" school.[14]

Part IV suggests that this fracturing of views is attributable at least in part to the unwillingness of most international lawyers to articulate and defend the methodology that they are using in reaching their views, which would require confronting certain methodological problems in assessing state practice since the enactment of the U.N. Charter in 1945.[15] The lawyer's craft is something between an art and a science; although interpretation of prior precedent cannot be done with precision, it must be done in accordance with recognizable and rational standards in order to be persuasive.

Until lawyers more fully grapple with these issues of methodology, it is unlikely that greater convergence within the community of international lawyers will emerge. Through greater convergence, the normative standards set by international law may become clearer and more helpful for states in ordering their relations, thus promoting greater stability for inter-state relations. Moreover, if at some point there is an effort to amend the Charter or to supplement the Charter with more detailed criteria for uses of force, greater convergence of views among international lawyers will be essential.

Before turning to the relevance of international law to this particular topic, a word on terminology is in order. For purposes of this article, the term "self defense" refers to the use of armed coercion by a state against another state in response to a prior use of armed coercion by the other state or by a non-state actor operating from that other state. "Anticipatory self-defense" refers to the use of armed coercion by a state to halt an imminent act of armed coercion by

another state (or non-state actor operating from that other state). Thus, anticipatory self-defense contemplates a situation where a state has not yet been the victim of such a coercive act, but perceives that such an act is about to occur in the immediate future (e.g., a foreign army is massing itself along the border in apparent preparation for invasion), and thus that potential victim state undertakes its own act of armed coercion to stave off the other's act. Such anticipatory self defense is, of course, "preemptive" in nature, but for purposes of this article, the term "preemptive" is not used to describe this form of self-defense. Instead, "preemptive self defense" is used to refer to the use of armed coercion by a state to prevent another state (or non-state actor) from pursuing a particular course of action which is not yet directly threatening, but which, if permitted to continue, could result at some future point in an act of armed coercion against the first state. Such preemptive self-defense is, of course, "anticipatory" and might even be called "preventive" self-defense, but for purposes of this article, such terminology is not used to describe this form of self-defense.

II. WHY THE LAW MATTERS

Law has many different functions. In the context of international law relating to the use of military force, law is best seen as a means of predicting global reactions to a proposed use of such force. In this context, when a lawyer says that a proposed course of action would be unlawful, the lawyer is really saying that in the past international society has decided that such an action is wrongful and, in similar circumstances, will likely do so again. Lawyers are trained to be good at making such predictions; they are fixated on the instruments of the past, be they treaties or statutes, which crystallize societal expectations, principles and beliefs into rules.

Lawyers are also fixated on understanding and interpreting prior factual incidents in which those societal beliefs were tested and perhaps refined through courts and other decisionmakers.

Where there are gaps in our understanding of societal expectations, lawyers are clever at analytically filling those gaps and at seeking to extrapolate from what we know about societal beliefs to make situations of uncertainty more certain. And perhaps most important, lawyers appreciate that society deeply adheres to a normative system that will endure, and this in turn means that rules must operate over the long-term. They cannot be set aside when convenient to serve short-term interests, and they must be perceived as fair, legitimate, just and consistent with

notions of equality, rather than arbitrary or irrational.

A government policy-maker considering an act of preemptive self-defense will want to know if the act would be regarded as lawful because it helps predict attitudes within the policy-maker's own government, whether those attitudes emerge in executive, legislative or judicial settings. To the extent that the act is regarded as a violation of international law, the policy-maker is being alerted that the act would likely be viewed as wrongful. Knowing whether the act would be regarded as lawful will assist the policy-maker in predicting whether the general public would view the course of action as wrongful and whether foreign governments and their peoples, and possibly an international court, would react adversely to the course of action.[16] Even in the United States, a country where public attitudes toward international law vary considerably, government officials and legislators seek to convince the public why a particular course of action is consistent with international law.[17]

Societal attitudes are important because if resistance is strong, the policymaker may not be able to undertake a particular course of action (e.g., in the United States or the United Kingdom, an adverse legislative vote may make an executive resort to military force untenable). Of course, even in the face of strong resistance, the policy-maker might undertake the act if, for political or national security reasons, the policy-maker feels there is no choice. But the policy-maker may be interested in knowing whether, by conducting the action in a particular way, the policy-maker is more or less likely to run afoul of the law, for such knowledge may help the policy maker achieve the objectives with the lowest level of societal approbation. That approbation may have serious consequences for the policy-maker, particularly over the long-term, in the form of eroding political support domestically and abroad for a government's policies, inability to secure military assistance from foreign partners in the form of troops, bases, transport and materials, and the inability to share with those partners or international organizations the economic costs of both the military action and any ensuing acts of peacekeeping or reconstruction.

To date, however, lawyers have had difficulty in reaching a consensus on whether preemptive self-defense is lawful and, if so, whether certain criteria or conditions must be met. Because no authoritative decision-maker has spoken directly to the issue, international lawyers are left arguing the legality of preemptive self-defense based principally on their interpretation of the

meaning of the U.N. Charter as enacted in 1945 and on state practice since that time. In doing so, lawyers have taken very different views regarding the legality of preemptive self-defense and, as discussed in the next section, those views might be seen as falling into four basic schools of thought.[18]

III.FOUR SCHOOLS OF THOUGHT

Contemporary attitudes of government lawyers or academics on the issue of preemptive self-defense tend to fall into four different schools of thought.

Describing these views as "schools" may be overly formal; such lawyers probably do not see themselves as part of a "school" in the sense of having an elaborate framework upon which their views are constructed. Moreover, international lawyers within a single school may differ in certain respects, and the views of some international lawyers may be seen as straddling these schools of thought or as moving from one school to another over time.[19] Nevertheless, the different schools identified here rest upon broad conceptions as to the status of international law on this topic, and probing at those different conceptions may help in promoting convergence among them.

A.THE STRICT-CONSTRUCTIONIST SCHOOL

The strict constructionist school begins with the proposition that Article 2(4) of the U.N. Charter contains a broad prohibition on the use of force.[20] The term "use of force" in Article 2(4)--as opposed to the term "war," as used in the Kellogg-Briand Pact of 1928[21]--reflected a desire to prohibit transnational armed conflicts generally, not just conflicts arising from a formal state of war. As such, this school emphasizes that Article 2(4) is best viewed as outlawing any transboundary use of military force, including force justified by reference to the various doctrines developed in the pre-Charter era of forcible self-help, reprisal, protection of nationals and humanitarian intervention.[22] To the extent that there is a need to refer to the negotiating history of the U.N. Charter, that history indicates that Article 2(4) was intended to be a comprehensive prohibition on the use of force by one state against the other.[23]

The strict constructionist school acknowledges that the U.N. Charter provides two express exceptions to this broad prohibition. First, the Security Council may authorize a use of force

under Chapter VII of the Charter,[24] which would require an affirmative vote of nine of its fifteen Members and the concurrence or abstention of its five permanent Members (China, France,

Russia, United Kingdom and United States). Some strict constructionists might challenge the authority of the Security Council to authorize Member States, especially if operating under national military command, to engage in preemptive self-defense, but the debate over preemptive self-defense to date has not related to potential Security Council authorization.

Second, states may use force in self-defense pursuant to Article 51 of the Charter. Article 51 states that the Charter does not impair the "inherent right" of self-defense "if an armed attack occurs" against a U.N. Member.[25] In considering the legality of preemptive self-defense, the strict constructionist school hews closely to the language of Article 51. Because Article 51 only contemplates an act of self-defense "if an armed attack occurs," the strict constructionist maintains that neither anticipatory self-defense nor preemptive self-defense can be lawful because such forms of self-defense envisage action prior to an armed attack actually occurring.[26]

Thus, Ian Brownlie, writing in 1963, found that "the view that Article 51 does not permit anticipatory action is correct and …arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence."[27]

For Philip Jessup, "[u]nder the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened."[28]

For Louis Henkin, allowing anticipatory action "would replace a clear standard with a vague, self-serving one, and open a loophole large enough to empty the rule."[29] Likewise, Yoram Dinstein, writing more recently, finds that [w]hen a country feels menaced by the threat of an armed attack, all that it is free to do--in keeping with the Charter--is make the necessary military preparations for repulsing the hostile action should it materialize, as well as bring the matter forthwith to the attention of the Security Council.[30]

Moreover, the strict constructionist would note that in using the language "armed attack" rather than "use of force," Article 51 is limiting the use of selfdefense to those situations where the

victim state is exposed to a large-scale use of force, such as an invasion or a bombardment or other "most grave forms of the use of force."[31] This form of limitation does not speak directly to the issue of preemptive self-defense, but the uncertainty as to whether a future threat would actually rise to a level of being an "armed attack" may also suggest that preemptive self-defense was disfavored under Article 51.[32]

Adherents to this school typically accept that state practice subsequent to the enactment of the U.N. Charter is relevant,[33] although they (and many international lawyers) are often not clear whether such practice is relevant for the purpose of: (1) interpreting the meaning of the Charter, since conduct by the parties to the Charter demonstrate the parties interpretation of its meaning; or (2) establishing a new norm of customary international law that supersedes the obligation of the Charter. In any event, the strict constructionist's review of that practice finds that invocations of a right of anticipatory self-defense (let alone a right of preemptive self-defense) are rare and are resisted by other states. Thus, Louis Henkin, writing in 1979, asserted that "neither the failure of the Security Council, nor the Cold War, nor the birth of many new nations, nor the development of terrible weapons, suggests that the Charter should now be read to authorize unilateral force even if an armed attack has not occurred."[34]

Christine Gray, writing in 2000, concluded that States prefer to argue for an extended interpretation of armed attack and to avoid the fundamental doctrinal debate. The clear trend in state practice is to try to bring the action within Article 51 and to claim the existence of an armed attack rather than to expressly argue for a wider right under customary international law.[35]

When pressed, some strict constructionists accept that anticipatory or preemptive action, while illegal, in some circumstances "may be justified on moral and political grounds and the community will eventually condone [it] or mete out lenient condemnation."[36]

B. THE IMMINENT THREAT SCHOOL

Adherents to the "imminent threat" school accept that the language of Article 51 speaks of self-defense in response to an armed attack, but they employ three lines of argument to advance a norm favoring a right of anticipatory self-defense, but not preemptive self-defense.[37]

First, they note that Article 51 speaks of the Charter not impairing an "inherent right" of self-

defense, meaning that Article 51 does not create a right of self-defense but instead preserves a right that pre-existed the Charter.[38] As such, adherents to this school note that the customary international law of selfdefense prior to 1945 recognized the ability of a state to defend against not just an existing attack, but also against an imminent threat of attack.[39] The principal precedent relied upon is the Caroline incident, an 1836 clash between the United States and the United Kingdom in which U.S. Secretary of State Daniel Webster stated that self-defense is confined to "cases in which the 'necessity of that selfdefence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[40]

For adherents to the imminent threat school, this inherent right to defend against an imminent threat was preserved in Article 51.[41] The language "if an armed attack occurs" does not impose a condition on the exercise of this inherent right; it is simply indicating the general type of right that is being preserved.[42] Indeed, this school notes, the French text of the U.N. Charter (which is equally authoritative with the English text), preserved an inherent right of self-defense "dans un cas où un Membre des Nations Unies est l'object d'une agression armée" ("in a situation where a Member of the United Nations is the object of an armed attack"), a formulation that reads much less restrictively than its English counterpart.[43] Although the strict constructionist sees such an interpretation as writing the "armed attack" language out of Article 51, the imminent threat theorist finds absurdity in believing that the drafters bent over backwards in Article 51 so as not to impair an "inherent right" only to then significantly restrict that right.[44]

A second line of argument employed by this school is to expand the meaning of the term "armed attack." Although a narrow interpretation of armed attack might envisage only a use of force that has been consummated, a broader interpretation would view an "armed attack" as including an attack that is imminent and unavoidable even if not yet consummated. Thus, when a state begins massing an army in an attack configuration along the border of another state, the first state has commenced the initial step of a multi-step armed attack, and the second state may respond in self-defense. Here, too, the argument is concerned with the temporal nature of the threat; it must be closely associated in time and space with the expected unleashing of force. Although Louis Henkin is typically associated with the strict constructionist school, he accepts that if: there were clear evidence of an attack so imminent that there was no time for political action to prevent it,

the only meaningful defense for the potential victim might indeed be the preemptive attack and--it may be argued--the scheme of Article 2(4) together with Article 51 was not intended to bar such attack. But this argument would claim a small and special exception for the special case of the surprise nuclear attack…[45]

Third, this school focuses on state practice since 1945, which purportedly demonstrates an acceptance of self-defense by states when an attack is imminent and unavoidable. In this regard, repeated references are made to certain key incidents, such as: the 1962 "quarantine" of Cuba by the United States; the 1967 Arab-Israeli war; the 1981 Israeli attack against an Iraqi nuclear facility; and the 1986 U.S. bombing raids against Libya.[46] For each incident, according to this school, a state may be seen undertaking an action purportedly in self-defense that precedes an armed attack.[47] Adherents to the imminent threat school conclude that, by parsing this practice, states may be seen either accepting or tolerating the use of military force by a state against another state when faced with an imminent armed attack.[48] Thus, Thomas Franck writes: States seem willing to accept strong evidence of the imminence of an overpowering attack as tantamount to the attack itself, allowing a demonstrably threatened state to respond under Article 51 as if the attack had already occurred, or at least to treat such circumstances, when demonstrated, as mitigating the system's judgment of the threatened state's pre-emptive response.[49]

At the same time, adherents to this school are unwilling to expand the meaning of Article 51 beyond the concept of responding to an imminent armed attack.[50] For them, accepting the legality of preemptive self-defense would place the law on a very slippery slope, taking us back into the pre-Charter world in which nations resorted to warfare for "just" causes.[51] Without the immediacy of an attack, states must try to predict a future threat based on intelligence that will always be tentative and often inaccurate.[52] Further, in rejecting the concept of preemptive self-defense, the imminent threat school relies in part on the customary international law doctrine that force must only be used in accordance with principles of necessity and proportionality.[53] In considering whether force is "necessary," international lawyers ask certain core questions, such as whether the act undertaken seeks solely to halt or repel the armed attack,[54] and whether there were peaceful alternatives available, such as pursuing diplomatic efforts.[55] In considering

whether an act of self-defense is proportional, international lawyers consider the scale of the defensive force in relation to the act against which it is directed.[56] Under either principle, the imminent threat school stresses that a movement from anticipatory self-defense to preemptive self-defense presents troubling and insurmountable conflicts.[57] It is simply not possible to gauge with any degree of confidence whether an act of preemptive self-defense today is necessary to deal with a threat that may not materialize for months or years. Similarly, one cannot gauge whether the act of preemptive self-defense today is proportionate to an inchoate future threat.[58] As such, preemptive selfdefense cannot be regarded as lawful.

C. THE QUALITATIVE THREAT SCHOOL

Adherents to the qualitative threat school agree with the imminent threat school that a state need not await an actual armed attack, but believe that the latter school's requirement of an imminent threat is misplaced. For the qualitative threat school, the world has changed significantly since 1945, particularly with the advent of weapons of mass destruction and the rise of global errorism. Adhering to the strictures of the Caroline standard in a contemporary world is a recipe for paralysis in the face of grave threats.[59] For this school, President John Kennedy had it right when he identified the nuclear age as one in which the actual firing of a weapon can no longer be the touchstone for determining whether a nation is in peril.[60] Rather than emphasize just the temporal nature of a future attack, this school looks to other qualitative factors,[61] such as the probability that an attack will occur at some future point, the availably of nonforcible means for addressing the situation, and the magnitude of harm that the attack would inflict.[62] Where those qualitative factors indicate that there is a high probability of a future, highly destructive attack, a state may act as necessary and proportionate in preemptive self-defense. According to this school, accepting this approach to self-defense would result in a greater, not lesser likelihood of maintaining world public order because it would serve to deter state and non-state actors from embarking on programs likely to lead to armed conflict.[63]

For this school, state practice since 1945--such as the U.S. "quarantine" of Cuba, the 1989 U.S invasion of Panama,[64] and the U.S. attacks against Libya in 1986, Iraq in 1993,[65] and Sudan and Afghanistan in 1998[66]--supports the acceptance of preemptive self-defense because there was no imminent attack against which the state in those incidents was defending. Although many states

opposed such uses of force (and most incidents involved deployment of force by just a single actor, the United States), this school nevertheless sees those incidents as evincing a degree of global tolerance of preemptive self-defense in appropriate circumstances.

The qualitative threat school sees its views as simply extending the position expressed by the imminent threat school, so as to take account of the full spectrum of potential armed attacks. If one were to try to represent graphically the views of the qualitative threat school, one might develop a threedimensional graph reflecting on three axes three principal factors of relevance in determining the legality of an act of preemptive self-defense: (1) the imminence of an attack (the higher it is, preemptive force is more acceptable); (2) the level of coercive force used in response (the lower it is, preemptive force is more acceptable); and (3) the threat to the existence of the responding state (the higher it is, preemptive force is more acceptable).

D.THE "CHARTER-IS-DEAD" SCHOOL

Finally, there is a school of thought that sees the rules on the use of force embedded in the Charter as completely devoid of any legally significant normative value. In 1945 these rules might have had some cachet, but the practice of states over the course of the past sixty years can only lead to a conclusion that states do not adhere to the U.N. Charter in any legally meaningful way and, therefore, the rules have fallen into desuetude. States may say that the rules exist and that they are adhering to them,[67] but this is simply empty rhetoric, a public relations ploy designed to mask the reality of states simply pursuing their political interests.

Michael Glennon writes: The Charter's use of force rules have been widely and regularly disregarded. Since 1945, two-thirds of the members of the United Nations--126 states out of 189--have fought 291 interstate conflicts in which over 22 million people have been killed. In every one of those conflicts at least one belligerent necessarily violated the Charter. In most of those conflicts, most of the belligerents claim to act in self-defense. States' earlier intent, expressed in words, has been superseded by their later intent, expressed in deeds.[68] As a consequence, the "Charter-is-dead" school sees no legal impediment to engaging in self-defense, anticipatory self-defense or preemptive self-defense, whenever a state perceives a need to protect the well-being of its people. Our global civilization may evolve such that states, powerful and less powerful alike, can reach consensus on international rules concerning the use of force (perhaps through

effective enforcement mechanisms), but until then there is no point in trying to split legal hairs about the meaning of Article 51.

IV.CAN THE SCHOOLS BE RECONCILED? CONFRONTING METHODOLOGICAL PROBLEMS IN ASSESSING STATE PRACTICE

The strikingly divergent views on the legality of preemptive self-defense no doubt have several causal explanations. International law as a whole suffers from the lack of authoritative decision-makers, such as a supreme court with plenary power to decide controversial questions of either legal process or substance, thus making harder a convergence of views. Further, international law on the use of force presents particular difficulties in promoting state fidelity to a normative structure given that adherence to norms is under the greatest stress when issues of national security are at stake. Finally, the norms may not be static in nature. Whether September 11 can be viewed as a "constitutional moment" for international law--meaning a moment in which seismic shifts in international law occurred without any formal amendment--is unclear, but the rise of global terrorism represented by those attacks challenges many of the conventional assumptions upon which international law has been based.

Despite these many factors, a central reason for these divergences of view may well be that international lawyers are not explaining the methodology that they are employing in determining the state of the law, are not recognizing that their disagreement with other international lawyers arises largely from the use of different methodologies and are not articulating why one methodology is superior to another. In particular, to the extent that state practice is deemed significant for purposes of interpreting the U.N. Charter or determining the emergence of a new customary rule of law, international lawyers rarely explain their view as to the circumstances that merit using state practice to establish an evolution in the state of the law and too often provide only a cursory analysis of such practice to see if those circumstances are met. Unfortunately, in reading the literature one cannot help but feel that international lawyers are often coming to this issue with firm predispositions as to whether anticipatory self-defense or preemptive self-defense should or should not be legal and then molding their interpretation of state practice to fit the predispositions.

Ideally, international lawyers would agree upon a narrative explanatory protocol that would set forth a coherent structure for analyzing and configuring state practice, as has been done in the field of international relations theory.[69] Among other things, developing such a protocol may allow international lawyers to move away from a binary discussion of whether preemptive self-defense is lawful or unlawful, to one that explores the subtleties and nuances of how states react to varying levels of such force being used in different kinds of factual scenarios. The purpose of this section is to identify some of the key issues that arise in assessing methodology and state practice on this topic in the hope that it may promote the pursuit of an explanatory protocol and in turn more rigorous analyses by international lawyers and more convergence in the positions taken by them regarding the legality of preemptive self-defense.[70] Through greater convergence in the views taken by international lawyers, the normative standards set by international law may become clearer and more helpful for states in ordering their relations.

A. THE PROBLEM OF CLARIFYING METHODOLOGY

Most international lawyers are taught that when faced with a question of whether a particular treaty has been violated (such as the U.N. Charter), one is to focus on the "ordinary meaning" of the terms of the treaty, in their context and in light of the treaty's "object and purpose."[71] Moreover, one may also take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[72] Virtually

all international lawyers writing on the doctrine of preemptive self-defense either consciously or unconsciously use some elements of this approach to treaty interpretation, but they often adopt a particular component of the methodology that is useful for advancing their position on preemptive self-defense and avoid emphasizing (or even recognizing) other components. An emphasis on the text of the treaty is sometimes referred to as a "textual" or "literal" approach, and an emphasis on the object and purpose of the treaty is an "effective" or "teleological" approach.[73]

Thus, the "strict constructionist" school heavily relies on the ordinary meaning of the terms of Article 51, which, as discussed above, appears to require an "armed attack" prior to engaging in a right of self-defense.[74] For the strict constructionist, the language of Article 51 presents a high hurdle over which the other schools cannot leap. Yet, this school tends to downplay or ignore the

other elements relevant to treaty analysis, particularly the possibility that over time states may reinterpret Article 51 through their practice. Since 1945, states have deviated from the language of the Charter in many ways that are found acceptable by states, ranging from the practice of permanent Members abstaining (rather than concurring) on substantive issues decided by the Security Council[75] to the reading of UN Charter Article 23's reference to "the Union of Soviet Socialist Republics" as meaning now the "Russian Federation"[76] to the use of conflict resolution techniques nowhere contemplated in the Charter, such as U.N.-authorized "peacekeeping" forces, the General Assembly's use of the "Uniting for Peace" resolution[77] or U.N. authorizations to military forces operating under national commands.

The strict constructionist normally reviews some of the state practice since 1945, but finds such practice too sparse or unconvincing to establish a reinterpretation of Article 51.[78] The strict constructionist, however, would be more convincing by explaining clearly his methodology for examining state practice (such as by confronting several of the problems identified below) and indicating why a norm favoring, for example, the bestowal of Security Council authority on states operating under national commands is deemed lawful under that methodology, whereas preemptive self-defense is not. Moreover, the strict constructionist often stresses evidence within the negotiating history of the Charter that favors a restrictive reading of Article 51, even though standard treaty interpretation disfavors reference to such history absent ambiguity in the text or absurdity in application of the text.[79] The strict constructionist should confront the fact that subsequent state practice holds a higher place under standard treaty interpretation than negotiating history and should candidly assess whether the ordinary meaning of Article 51 is ambiguous and susceptible to alternative interpretations.

The "imminent threat" school also dwells somewhat on the ordinary meaning of Article 51, but stresses the term "inherent right" of self-defense and uses such language to bootstrap in the pre-Charter standard of self-defense reflected in the Caroline incident in support of its position.[80] Yet, the "imminent threat" school senses the weakness in focusing on the language of Article 51 and thus moves quickly in its methodology to post-1945 state practice, typically providing a more detailed account of that practice than the strict constructionist.[81] Here too, however, "imminent threat" theorists usually do not examine their methodology for assessing state practice; it remains

unclear exactly what elements of state practice are relevant and why. Like strict constructionists, imminent threat theorists would be more convincing if they set forth a cogent methodology, explained how that methodology fit with respect to issues other than anticipatory self-defense and then used the methodology to demonstrate why anticipatory self-defense is permissible.

The "qualitative threat" school downplays the ordinary meaning of Article 51 of the U.N. Charter--even denigrates reliance on such language as a "push button" approach to legal analysis[82]—-and further downplays post-1945 state practice, no doubt realizing that neither is particularly useful in establishing a right of preemptive self-defense. Instead, the qualitative threat school at its heart argues that preemptive self-defense is lawful because the "object and purpose" of Article 51 is to maintain each state's inherent right of self-defense.[83] They believe that in a world with WMD and terrorists acting secretly and with state support the only reasonable way of achieving this purpose is to permit preemptive self-defense.[84]

A central problem with this approach is that reasonable minds disagree on the object and purpose of Article 51. For the strict constructionist school, the object and purpose of Article 51 is to "cut to a minimum the unilateral use of force in international relations,"[85] which is best served by precluding both anticipatory self-defense and preemptive self-defense. At the end of the day, the qualitative threat school must confront why its "reasonable" interpretation of the Charter's object and purpose is superior to that of others. The most plausible means for doing so would be to establish that the "qualitative threat" interpretation has been widely adopted by states, which in turn should lead this school into identifying and demonstrating a methodology of assessing state practice.

The "Charter-is-dead" school is deeply interested in post-1945 state practice, to the point of finding that such practice has completely upended whatever normative rules emerged in 1945. As noted above, for this school there is such widespread evidence in state practice of a departure from Charter norms that the norms have no meaning.[86] Therefore, preemptive self-defense is lawful (or at least cannot be considered unlawful). But this school typically does not advance a methodology of legal interpretation that can be seen as holding true with respect to international law and that therefore is appropriate to apply to preemptive self-defense. For instance, this school's reference to "291 interstate conflicts" since 1945 might prove that Charter rules on the

use of force have no normative value, but on the same logic, perhaps the lack of, say, 582 interstate conflicts proves that such rules have normative value.[87] In other words, laws are broken all the time; in the United States in 2002 there were 16,204 murders and 2,151,875 burglaries.[88] But the fact of law violation--even widespread law violation--is not commonly viewed as proving that the law does not exist or that it does not have an effect in conditioning the behavior of those to whom it is addressed.[89] For example, if the speed limit on a road is 55 miles per hour, but it is widely accepted that one may travel at 60 miles per hour without repercussions, then the speed limit has established a normative standard (55 plus 5) that individuals accept as appropriate for judging deviant behavior.

To seriously consider the relevance of interstate conflict since 1945, it would help to know whether there were instances where interstate conflict did not occur because an aggressor state found unacceptable the consequences of violating the non-aggression norm. It would help to know whether the existence of global norms on the use of force have, in some sense, seeped into the "collective consciousness" of global society. If so, then perhaps leaders today (as opposed to their predecessors of a century ago) are more apt to abide by the norm than they would in its absence, peoples are more apt to resist leaders who depart from the norm, and states are more apt to condemn other states that depart from the norm even though such departures inevitably occur. One might want to know in how many interstate conflicts since 1945 the norm provided a basis for galvanizing global reaction to the resort to force, whether in the dramatic form of the U.N.-authorized coalition that expelled Iraq from Kuwait in 1991 or the insistent pressure brought to bear on Eritrea and Ethiopia during 1998-2000. Even with respect to resort to force by powerful states, one might posit that raw power may be occasionally used, but that because deviation from the norm promotes instability and escalation, such states more often apply their power within the framework of the normative system.[90] The "Charter-is-dead school is correct that we cannot simply assume these things;[91] they must, if possible, be demonstrated.[92] At the same time, it is not convincing simply to assume that state conduct is not affected by norms on the use of force, especially because states repeatedly and consistently assert that the norms of the Charter are relevant and applicable and because there are instances where adherence to the norms seem quite important to states.[93] Close analysis of state practice would appear to be the best way for the "Charter-is-dead" school to prove that the rules of the Charter are indeed dead.

It would also be useful to clarify whether state practice since 1945 is relevant for the purpose of interpreting the meaning of the Charter or, alternatively, for the purpose of determining whether a new norm of customary international law has emerged that supersedes the obligations set forth in the Charter, and if so whether it makes any difference. To the extent that there is discussion of this issue, the strict constructionist school may resort to the notion of jus cogens[94] as a means of arguing that a new rule of customary international law cannot emerge because states may not deviate from the strict constructionist's interpretation of Articles 2(4) and 51,[95] but the other schools may question whether the emergent custom really deviates from the U.N. Charter or may challenge the very notion of jus cogens.[96] In any event, most discussions of preemptive self-defense tend to glide over this issue, even though it is central to the question of why and how one is considering state practice.

The brief discussion above suggests that there is a common component among the four schools of thought: the general lack of attention to the methodological approach in assessing the legality of preemptive self-defense and an unwillingness to explain why one approach is superior to another. At the same time, each of the four schools appears interested, to a degree, in the role of state practice since 1945, such that if better agreement existed among the schools regarding how such practice should be treated, it might be possible to see some convergence among them.[97] Thus, if the "strict constructionist" and the imminent threat" theorist can agree that post-1945 state practice matters, then ocusing on and perhaps reaching agreement how such practice should be assessed would be a helpful step prior to actually assessing the practice. Likewise, the "qualitative threat" theorist may downplay state practice of the kind typically raised in discussions of preemptive self-defense, but if the qualitative threat theorist could convince the other schools that state practice should be viewed as broader than just actual incidents of state conduct so as to encompass evidence of broader expectations and beliefs of governments and peoples, then the qualitative threat theorist might be positioned to demonstrate that state practice supports preemptive self-defense. With these observations in mind, the remaining portions of this section focus on some of the problems that must be confronted in taking state practice in this area seriously.[98]

B. THE PROBLEM OF RELYING ON WHAT STATES SAY VERSUS WHAT THEY DO

In assessing whether states in the past have engaged in anticipatory or preemptive self-defense, international lawyers are divided over whether, in assessing an incident of state practice, one should focus on the legal justification asserted by the state undertaking a use of force or, rather, look past that justification to try to ascertain what decision-makers actually believed about what was legally permissible.[99] In other words, if a state undertakes an action in a situation that on its face appears to be anticipatory or preemptive self-defense

(i.e., there is no factual basis for the existence of a prior armed attack), and the state nevertheless claims that it is acting in self-defense against an armed attack, international lawyers differ on whether this demonstrates adherence to the traditional norm of self-defense against an armed attack (albeit mistaken self-defense) or tacitly demonstrates adherence to a new norm of anticipatory or preemptive self-defense.[100] A more robust exchange among international lawyers as to whether a state's asserted legal justification is the exclusive touchstone when assessing state practice may help in promoting better convergences in their views.

For example, in her analysis of why state practice does not support a right of anticipatory self-defense, Christine Gray principally focuses on what states say they are doing, because the reluctance expressly to invoke anticipatory self-defense is in itself a clear indication of the doubtful status of this justification for the use of force.

States take care to try to secure the widest possible support; they do not invoke a doctrine that they know will be unacceptable to the vast majority of states.[101]

Gray then reviews various incidents sometimes referred to as demonstrating anticipatory self-defense, such as the 1967 Israeli strikes against Egypt, Jordan and Syria and finds that because the attacking state (e.g., Israel) publicly stated that it had been the victim of a prior armed attack, the incident cannot stand as an example of anticipatory self-defense.[102]

This approach to assessing state practice may have the benefit of simplicity; one simply looks for the publicly asserted legal justification by the relevant state actor and decides whether that statement asserts the emergence of a new norm. In particular, one might focus exclusively on the legal justification presented by a state in its report to the Security Council, which is supposed to

occur as part of the state's obligation under U.N. Charter Article 51.[103] At the same time, there may be differing legal justifications advanced by different branches or agencies of a government, legal justifications may change over time, and, even if a single justification is asserted, the justification may either be too simple in nature ("we are acting consistent with the U.N. Charter") or too diverse in nature ("our actions are legally justified for a variety of reasons"), such that drawing a definitive conclusion becomes problematic.[104] Yet, assuming that one can divine a single stated legal justification, reliance solely on that justification raises important questions. If it were the case that states were repeatedly and consistently engaging in anticipatory self-defense or preemptive self-defense and yet simply stating that such action was in response to an armed attack, even when it was not, is it really correct simply to rely on the asserted legal justification when determining the operative rule? If the law on the books provides for a speed limit of 55 miles per hour, but a driver says that "I am not speeding" when the driver is going 60 miles per hour and there are no repercussions in doing so, it would seem that the better advice when someone asks "how fast can I go?" is that the normative system allows one to go 60 miles per hour. The reluctance of states to assert a legal justification that adopts a new norm may reflect a state's belief that there is no such norm, but it may also reflect the reality that during the time when states in transition from an old norm to a new, states wish to act in accordance with the new norm without being labeled as acting unlawfully, and thus seek to portray their acts as complying with the old norm.

The other schools appear much less focused on what a state says about its actions and more focused on what a state does. For example, Thomas Franck finds that the 1967 Israeli strikes were a precedent of anticipatory self-defense because Israel's argument that it was the victim of an armed attack "was difficult to credit," and that other "words and actions" demonstrated an Israeli acceptance of the right of anticipatory self-defense.[105] Similarly, in considering the relevance of the U.S. "quarantine" of Cuba in 1962, some international lawyers note that the United States based its official legal justification on a theory of "regional enforcement action" under Chapter VIII of the Charter and thus find that the quarantine is not a precedent for preemptive self-defense,[106] but others find such a justification not credible and therefore look past it to support a right of anticipatory self-defense[107] or preemptive self-defense.[108] Indeed, the entire "New Haven" school of international law as policy science was built upon peeling away the

formalistic rules advanced by states so as to ascertain the true rules upon which states actually operate.[109] Yet, as discussed in the next sub-section, the difficulty with this approach is in figuring out exactly what states are doing.[110]

This problem of whether to focus on what states say as opposed to what they do may account for why some international lawyers state unequivocally that the U.S. government has consistently supported a prohibition on the preemptive self-defense,[111] but others have asserted that the U.S. government has claimed a right of preemptive self-defense starting in the 1980s.[112] Still others see the United States as having engaged in preemptive self-defense from the earliest days of its history.[113] The recent invasion of Iraq highlights this problem. There is a widespread perception that the invasion of Iraq was an implementation of the doctrine articulated by the Bush Administration in 2002.[114] Indeed, when President Bush announced to the nation that military operations against Iraq had begun in March 2003, he said:

> *The people of the United States and our friends and allies will not live at the mercy of an outlaw regime that threatens the peace with weapons of mass murder. We will meet that threat now, with our Army, Air Force, Navy, Coast Guard and Marines, so that we do not have to meet it later with armies of firefighters and police and doctors on the streets of our cities.*[115]

At the same time, when explaining the legal basis for its action against Iraq under international law, the United States did not assert that the invasion of Iraq was permissible under international law because of an evolved right of preemptive self-defense.[116] Rather, the United States asserted that the invasion was lawful because it was authorized by the Security Council,[117] a theory also maintained by the other members of the U.S.-led coalition.[118] At most, it seems that some of the U.S. government's statements on the legality of the action contained cryptic references suggesting legal authority other than that emanating from Security Council resolutions, but the terms "anticipatory self-defense" or "preemptive selfdefense" are never used.[119] Consequently, it is no surprise that some international lawyers believe that the invasion of Iraq provides no precedent for a right of preemptive self-defense,[120] but others assert that it does.[121]

C. THE PROBLEM OF FIGURING OUT WHAT STATES ARE ACTUALLY DOING

If international lawyers look past a state's asserted legal justification to find out what states are

actually doing, they may avoid some of the concerns noted above, but they then must confront additional concerns. Is the inquiry seeking to determine objectively, without reference to a state's decision-makers' subjective attitudes, whether the state's conduct in using force demonstrates the emergence of a new legal norm? Or is the inquiry seeking to determine the attitudes of the state's relevant decision-makers, which might encompass attitudes as to why the state is using force or why its conduct is lawful?[122] In other words, in considering the action against Iraq in 2003, are we simply asking whether the United States embarked on a use of force in a situation that looks like preemptive self-defense? Or are we asking whether U.S. decision-makers undertook such action with a belief that they were preempting a future threat or that preemptive self-defense was lawful under the U.N. Charter, regardless of whether the official U.S. legal justification advanced a different theory?[123] If we are interested in decision-makers' attitudes, then we must further decide whether to focus on the heads of state, ministers, legal advisers, legislators or the general public. The imminent threat and qualitative threat schools might be more convincing to the strict constructionist and Charter-is-dead schools if they elaborated on exactly how such an inquiry should be conducted (e.g., by explaining which tools, such as social science techniques, should be brought to bear) and then conducted such an inquiry. Indeed, the Charter-is-dead school doubts whether such an inquiry is even possible and suggests that if it were conducted successfully, the answer might be that decision-makers are acting without any thought as to "the law."[124]

Leaving aside the issue of the relevant decision-makers' attitudes, a related concern is that it may prove extremely difficult to draw lines between "traditional" self-defense and anticipatory or preemptive self-defense in assessing what states are actually doing. International lawyers should clearly explain how one determines that a state is acting in "anticipation" or in "preemption" of a future action, rather than responding to a prior act. International lawyers would do well to recognize that traditional acts of self-defense often are concerned with the prevention of *future* coercion, while acts of preemptive self-defense invariably are concerned in part with *preexisting* coercion. Finding an appropriate delineation between the two is more difficult than international lawyers are usually willing to admit.

Thus, a standard formulation of what constitutes a "defensive" response refers to steps taken to

repel an attacker, but state practice suggests that this is far too restrictive in nature.[125] It is commonly accepted that, when one state invades another state, the invaded state may respond by not just repelling the invader, but by entering the invader's territory for reasons such as setting up a buffer zone until an armistice is concluded.[126] If the invader has been repulsed, however, why is a buffer zone allowed? It is a defensive means of preventing future attacks, even long after the guns have fallen silent. Further, even if a state does not invade another state, it is commonly accepted that if a state bombs a military base of another state, the second state may respond in proportionate self-defense, not as a means of stopping the initial bombing (which has already ended), but to deter and prevent such future attacks. Whether one classifies such a response as "defensive armed reprisal,"[127] "defensive retaliation"[128] or an act "undertaken in the framework of an ongoing armed conflict,"[129] the point is that the response is future-oriented, seeking to stop acts that are yet to occur. Even the ICJ, which is very restrictive in its approach to use of force issues, accepts that a series of military raids, in which territory is not occupied, might constitute an armed attack that merits self-defense, yet, here too, such a response is not repulsion of the prior raids, but anticipation and prevention of future ones.[130] The ICJ may even accept that it is possible to engage in self-defense to prevent future mining attacks, after just a single ship has been mined, so long as the complaining State can establish who mined the ship and the complaining State's response is necessary and proportionate to the mining.[131]

The problem of how one characterizes a "defensive" response is even more apparent in the context of responding to terrorist attacks, which are designed as sudden, single attacks without further sustained paramilitary engagement. For example, consider the United States' response to the terrorist attacks of September 11, 2001. Most international lawyers believe that the United States: (1) sustained an armed attack in September 2001 from a terrorist group supported by Afghanistan's de facto government and therefore (2) was entitled, under Article 51, to respond in self-defense in November 2001, deploying military forces to Afghanistan to eliminate al Qaeda bases and topple the Taliban government that tolerated them.[132] This factual sequence of self-defense is relatively straightforward and was accepted by Security Council, NATO and the Organization of American States.[133] Some international lawyers, however, have asserted that the United States' use of force constituted preemptive self-defense because the "armed attack against the World Trade Center and the Pentagon was over, and no defensive action could have

ameliorated its effects."[134]

This disagreement raises the question of what factual continuum should be used in considering whether an action is being taken "in anticipation" or "preemptively," which then raises the question of what a state may do when it engages in self-defense. Most international lawyers would not conclude, for example, that on December 8, 1941, the United States had no basis for acting in self-defense against Japan's attack on Pearl Harbor, simply because the attack was over and no defensive action could ameliorate its effects. Nor did the United States lose its right to engage in self-defense, even though it took many weeks for a buildup of ground and air forces in the Pacific before the United States could meaningfully respond to Japan's attack and months before General Doolittle's raid on Tokyo.[135] Rather, in these situations, there is a sense that -- given the fact of a prior attack--the attacked state must be able to engage in any action that is necessary to preclude any such attacks in the future, to wit defeating Japan militarily. Whether one is considering the World Trade Center or Pearl Harbor, there is an idea, embedded within standard notions of self-defense, that a state, having been attacked, may ward off future similar attacks through defensive action. Granted, the likelihood of future attacks is much more apparent when an attack already has occurred, but nevertheless the defensive response focuses on preventing future attacks, not simply repulsing the prior attack. Conversely, acts of preemptive self-defense, likely by definition, entail some preceding action by the state or group against whom the action is taken. If this is true, then the salient question asks at what point this traditional right of self-defense transitions into one of anticipatory self-defense or preemptive self-defense. In 1986, a bomb exploded in a German discotheque frequented by U.S. servicemen.[136] Thereafter, the United States bombed Libya.[137] Assuming that the initial bombing is regarded as an "armed attack" (which raises a different issue), is the U.S. action best regarded as traditional self-defense against a pre-existing attack, as some international lawyers claim, or is it preemptive self-defense against unknown attacks that may occur at some unspecified point in the future, as other international lawyers claim?[138] If one takes at face value NATO's claim that it was at least partially acting in selfdefense when it bombed the Federal Republic of Yugoslavia (FRY), Serbia & Montenegro in 1999,[139] is such action "anticipatory" given that the FRY had not yet unleashed its forces in Kosovo[140] or not because of the FRY's prior aggression in the Balkans in the course of the 1990s? Assuming that the U.S.-led invasion of Iraq in 2003 is best seen as a

form of self-defense under Article 51, is it preemptive or is it responsive to prior Iraqi armed attacks on its neighbors during the 1980s and 1990s, along with the threat created by its use of, and efforts to acquire, WMD? Until we achieve greater clarity in classifying such conduct, convergence of views about states' conduct in this area will be difficult.

D.THE PROBLEM OF ACCOUNTING FOR GLOBAL REACTIONS

Assuming that international lawyers can sort out how best to analyze the conduct of a state that resorts to a use of force, a further problem arises in gauging the reaction of other states to that state's conduct. In situations where arguably the state resorts to anticipatory self-defense or preemptive self-defense, the strict constructionist school dismisses that action as law-breaking, rather than law-making, by reference to whether other states have accepted the conduct as lawful or not.[141] This approach appears to be methodologically acceptable, whether one is considering state practice for purposes of interpreting the U.N. Charter or for determining the existence of a new customary rule of international law, but the same types of problems identified above, with respect to analyzing a state's conduct in using force, is now amplified by having to determine all other states' counter-practices in response to that force. Are we concerned only with the official positions of other states or do we wish to look behind them? Are we looking for legal interpretations or are the reactions of foreign states that might be construed as simply political statements relevant as well? When a foreign state condemns a use of force, it may express that condemnation in legal terms or it may not (one can condemn a lawful act for political, moral or other reasons).

Moreover, should one construe a state's silence in the face of a use of force as tacit acceptance, indifference or meaningless? Should we give equal weight to all states' views, so that tiny Andorra's voice is equal to China's and authoritarian governments' perspectives are just as valuable as those of democratic governments? The reality is that no international lawyer conducts a systematic review of the reactions of all 190 states to just one state's use of force, nor explains how, if such a review were done, we should deal with silence and conflicting views among states. Instead, international lawyers often look at the practice of just a few readily available states.[142] One has to worry that the availability of states' views may be self-selecting; perhaps states that vehemently oppose the use of force are those whose practice is easily located,

whereas those who approve or are acquiescent leave little trace of their views.

To avoid some of these difficulties, international lawyers often rely on decisions of the Security Council or the General Assembly in condemning, or not condemning, a particular use of force.[143] Nevertheless, use of state practice for treaty interpretation should focus on the states that are parties to the treaty, and not on other states, organizations or persons. As such, it is arguable that decisions of the Security Council or the General Assembly or of a regional organization, as to whether a state is acting consistently with Article 51 of the U.N. Charter, are not directly relevant or should be placed lower in the hierarchy of relevant state practice. They might only be relevant if the state's action had a bearing upon the provisions of the U.N. Charter that is relevant to that U.N. organ or regional organization.[144] These decisions might be used as surrogates for providing information about what states themselves actually think, but they should be recognized as indirect evidence of relevant state practice. And, again, at their heart, the General Assembly and the Security Council are political, not legal, organs; it is not always clear if they are expressing a view as to whether a particular use of force is a violation of the U.N. Charter.

On the other hand, perhaps the Security Council's decisions should, in some sense, be granted special significance given the role of the Security Council in maintaining international peace and security under the U.N. Charter.[145]

Perhaps when joining the Charter, states delegate to the Security Council the right to express their views on what conduct falls within or outside the norms set by the U.N. Charter, in which case we should downgrade the practice of states who are not Members of the Security Council at the time of the use of force in question.[146] Yet, to the extent that the views of an organ such as the Security Council are found to be particularly relevant, are only the resolutions actually adopted by the organ relevant, or are the individual views of the Security Council Members significant as well? If the views of the Security Council Members are indeed relevant, should we grant even greater relevance to the Security Council's permanent members, which have been recognized as having a special status in the maintenance of peace and security?[147] Sorting through issues regarding the way we assess global state practice is critical to closing the significant gaps between the different schools of thought on preemptive self-defense.

E. THE PROBLEM OF FREQUENCY OF PRACTICE

One central problem in analyzing state practice regarding preemptive self-defense is that traditional state practice on this topic is quite sparse. For lawyers opposed to preemptive self-defense, this lack of practice signals that preemptive self-defense is disfavored.[148] Yet scarcity of practice does not necessarily reflect such a belief; it may just indicate that the circumstances calling for preemptive self-defense only infrequently arise. At the same time, lawyers favoring a right of preemptive self-defense may believe they have identified certain instances where such action is condoned, but the infrequency of such practice makes it hard to ascertain a clear emergent consensus on the matter.

Four avenues of addressing the infrequency problem may be fruitful for analyses in this area. First, as indicated in the prior sections, each incident of potential preemptive self-defense should be more carefully analyzed so as to discern not just the circumstances of that incident, but also whether the incident suggests certain trends and, if so, their nuances.[149] It is not enough to recount briefly the facts of an incident and a few reactions from some states; more robust methodologies can, and should, be employed in determining what the incident stands for and how it should be viewed in the context of other incidents. One thoughtful approach may be seen in a genre of study advocated by Michael Reisman.[150] Perhaps through a higher quality of analysis of incidents of potential preemptive self-defense, the problem of quantity of incidents will be less severe.

Second, clarifying whether state practice is relevant in interpreting the meaning of the Charter or, alternatively, in determining whether a new norm of customary international law has emerged, may assist international lawyers when considering the frequency of practice necessary to establish a new meaning or norm. If resort to state practice is for the purpose of interpreting the Charter, arguably there need not be a high level of frequency of conduct; rather, what is needed is practice that "is consistent, and is common to, or accepted by, all the parties."[151] Alternatively, if state practice is being used as a means of establishing a new norm of customary international law, then there may be an expectation of greater repetition and constancy of practice,[152] possibly through acts and not just words,[153] particularly if it is deviating from a treaty to which states are parties.

Third, lawyers should consider expanding the scope of the practice taken into consideration when assessing the legality of preemptive self-defense because it may provide a much richer base of data upon which to assess legal expectations. Incidents of actual preemptive self-defense are obviously relevant, but a careful analysis would also look for other forms of state practice. For example, there may be relevant incidents where states decided that preemptive self-defense could be undertaken or where they threatened preemptive self-defense, even if ultimately such action was not taken. As discussed in President Clinton's recent memoirs, in 1993 the United States considered a preemptive strike against North Korea to disable a potential nuclear weapons program, but stepped back from doing so when North Korea entered into an accord with the United States.[154] Similarly, in February 2003, Japan asserted that it would launch a preemptive military action against North Korea if Japan had firm evidence North Korea was planning a missile attack.[155] Lawyers might systematically seek to uncover such decisions and warnings by states so as to determine whether states capable of projecting force, when confronted with a dangerous, albeit long-term, threat, view their obligations under the U.N. Charter as permitting the use of force against that threat, even if force ultimately is not deployed. Alternatively, such analysis might reveal insistent voices in opposition to the deployment of such force, whose objections are galvanized by concerns with violating global expectations as embodied in the U.N. Charter. Further, relevant state practice might be found in the use of force beyond scenarios of anticipatory self-defense or preemptive self-defense. If state practice can be found in other areas, such as humanitarian intervention or rescue of nationals, indicating a departure from the apparent norm embedded in Article 51, then perhaps all such practice considered collectively can provide better insight into general contemporary norms on the use of force, which in turn would be helpful in considering preemptive self-defense.

There may also be relevant state practice separate from incidents of the use of force. Rather than trying to take "snapshots" of government attitudes in reaction to specific incidents, perhaps international lawyers should be seeking information about the attitudes of government decision-makers on a day-to-day basis, and perhaps with respect to matters of direct concern to them. For example, suppose it were possible to obtain a memorandum from the legal office of every foreign ministry of all 191 states that would directly answer the following three questions:

1. If your government was convinced that your country was in danger of an imminent attack by a neighboring state, and you had the means to act militarily in advance of that attack to stop it, would doing so violate your obligations under the U.N. Charter?
2. If your government was convinced that your country was in danger of an attack at some point in the next twelve months by a neighboring state, and you had the means to act militarily in advance of that attack to stop it, would doing so violate your obligations under the U.N. Charter?
3. Do you still regard the U.N. Charter as binding law with respect to the use of force by Member States?

International lawyers might consider whether having those 191 memoranda would be much better evidence of the status of contemporary norms on the use of force than focusing exclusively on actual incidents of anticipatory or preemptive self-defense. Certainly, the answers given by a state in the context of itself facing a threat of an attack seems more pertinent than the vote of that state's representative at the U.N. General Assembly, with respect to an incident that occurred across the globe (a vote about which the permanent representative may not even have instructions from her home government). If having such memoranda would be highly probative, then perhaps international lawyers should be thinking about how to go about getting them or something like them.

Other forms of practice might be considered as well, such as trends in the development of new international agreements or the attitudes of states as expressed through decisions by international organizations unrelated to specific incidents. For example, there is an extensive web of international agreements on WMD, ranging from the Nuclear Non-Proliferation Treaty[156] to the Chemical Weapons Convention[157] to the Biological Weapons Convention[158] to other related instruments,[159] all designed to help maintain international peace and security among states. Although none of these instruments expressly authorizes states on their own initiative to enforce compliance, and indeed contemplate alternative methods for monitoring and exposing compliance, international lawyers might consider whether the existence of such widely-adhered to agreements has influenced for states the meaning to be placed on Article 51.

Shortly after adoption of the U.N. Charter, the International Atomic Energy Agency ("IAEA")

asserted that violation of an IAEA convention might be of so grave a character as to give rise to a right of self-defense under Article 51.[160] The United States also took this position.[161] International lawyers might study whether such an attitude can be found within various international organizations today concerned with WMD, whether the use of military force by one or more of the major military powers to ensure compliance with WMD obligations is acknowledged or at least tacitly accepted by such organizations in their dealings with recalcitrant states, or whether, in fact, such a possibility is routinely rejected as unlawful.

Similarly, there is an extensive web of international agreements directed against specific types of terrorist acts, such as hijacking of aircraft,[162] sabotage of aircraft,[163] taking of hostages,[164] violent offenses onboard aircraft,[165] crimes against certain protected persons[166] and--most recently--the suppression of terrorist bombings[167] and the financing of terrorism.[168] Although none of these instruments expressly authorizes states to use military force against another state to prevent terrorist attacks, the conventions typically require states to criminalize not just the commission of a terrorist act, but the intent to commit such acts, as well as the facilitation and support given to such acts.[169] At the same time, states' language with respect to terrorism has become increasingly cast in terms of a "war" on terrorism and a need to "combat" terrorists. Thus, the Security Council has repeatedly declared that "acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century"[170] and has called upon states "to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism."[171] Moreover, the Security Council has expressed its determination to "combat by all means threats to international peace and security caused by terrorist acts," and in that context has recognized the inherent right of selfdefense. [172] International lawyers might consider whether the existence of widely adhered to agreements outlawing terrorism and the increasingly strident premium placed on adhering to such agreements to "combat" such a "threat" to international peace has begun to influence the meaning to be placed on Article 51, the same way that the emergence of human rights treaties has led to changing views on the permissibility of humanitarian intervention.[173] A close analysis of the conclusion of terrorist-related agreements and resolutions might lead to a view that the attitudes of states are changing, or might alternatively demonstrate that such attitudes are closely hewing to the belief that preemptive self-

defense is not within the scope of global expectations with respect to permissible action.

Finally, international lawyers might do better at considering the relevance of national laws relevant to the issue of preemptive self-defense. In international law, principles of law operating among the national legal systems of states are accepted as a source of international law, typically filling in the gaps and uncertainties that necessarily exist in a decentralized interstate system. If one were to survey civil law, common law, Islamic law, and the legal systems of Africa and Asia, an international lawyer might uncover useful information about societal expectations on how the law should operate in situations involving the use of force and self-defense by persons. Such laws might arise in the context of transnational uses of force,[174] in the context of the rules of engagement adopted as a part of national military regulations and instructions or in the context of permissible self-defense by persons under sophisticated national criminal laws.[175]

If there is a consistent pattern of legal systems that accept "self-defense" as inherently including actions in response to an immediate threat, then such information would appear to be of some value in gauging contemporary interpretations of Article 51. Likewise, the inquiry might provide useful information on whether self-defense may be preemptive in nature, such as national criminal laws allowing a wife to slay an abusive, sleeping husband who she thinks, at some point in the future, will in turn slay her. Of course, there are reasons why the patterns discerned in global legal systems may not be appropriate; with respect to national criminal laws, states are not persons, and persons typically operate within national criminal law systems whereas states do not. Nevertheless, by broadening their scope of inquiry to include general principles of law, international lawyers might help close some of the gaps among them.

F.THE PROBLEM OF RECENT VERSUS DISTANT PRACTICE

Assuming that the above problems can be addressed, international lawyers might also consider whether more recent state practice should be given greater emphasis than more distant practice. Whether that practice is in the form of actual incidents involving the use of force or other evidence of the attitudes of state decision-makers, presumably older practice is less relevant than newer practice. International lawyers, however, rarely discuss state practice in such a manner, and instead lump together incidents spanning decades. Yet, there appear to be significant historical periods where global politics have dramatically influenced the way states think about

uses of force, whether it be the bipolar confrontation of the Cold War, the "new world order" of the immediate post-Cold War or the post-September 11 period in which we now find ourselves. Is evidence of state practice across these different time periods all of equal weight? Should the most distant be discarded as antiquated or should practice within any particular period be discarded as aberrant?

For example, should any examples of anticipatory or preemptive selfdefense during the Cold War, when there was virtually no chance of the Security Council authorizing states to use force, now be discarded because the Security Council has demonstrated repeatedly since 1990 its willingness to authorize the use of force, even if in some circumstances (e.g., the 2003 invasion of Iraq) it does not? Or conversely, to the extent that it is relevant that the Israeli attack on the Iraqi nuclear facility at Osirak in 1981 was widely condemned by states at the time,[176] would it also be relevant if it could be shown that by 1991, after weapons inspectors entered Iraq and realized how much progress Iraq had made on the development of nuclear weapons, many states believed that, in hindsight, the Israeli attack was a blessing?

G.THE PROBLEM OF RESORT TO THE TRAVAUX OF THE CHARTER

As noted above, treaty interpretation calls for recourse to the preparatory work of the treaty (or travaux préparatoires) only when the initial interpretation leads to an ambiguous or obscure meaning or to an absurd or unreasonable result.[177] In the context of construing Article 51 of the U.N. Charter, the different schools discussed above typically find their own interpretation as unambiguous, but that of the other schools as absurd or unreasonable.[178] As such, international lawyers tend to resort to the negotiating history of the Charter (principally the records of the San Francisco Conference in 1945) to bolster their existing position.[179] Strict constructionists find that the travaux préparatoires preclude anticipatory self-defense and preemptive self-defense,[180] but imminent and qualitative threat theorists find the opposite.[181]

To the extent that international lawyers see the travaux préparatoires as relevant,[182] international lawyers might first confront the proposition--for which there is some authority--that when interpreting the text of the constitution of an international organization, the original intention of the drafters of the constitution should not be emphasized, particularly because the parties may increase or change, and because such a constitution, by its nature, should not be viewed as

static.[183] If that proposition is correct, then we are better served by inquiring into state practice today by the Members of the United Nations, then trying to fathom original meanings.

On the other hand, if we are to explore original meanings, international lawyers may wish to broaden their inquiry beyond the official documents tabled at the San Francisco Conference, since by doing so they will find that the idea of preemptive self-defense was known to those present at San Francisco, and that the Charter was drafted so as to preclude such action.[184] The impetus for Article 51 came from the U.S. delegation to the conference in response to certain demands from the Latin American delegations.[185] In the course of the U.S. drafting of the article, U.K. Foreign Minister Anthony Eden apparently argued to U.S. Secretary of State Edward Stettinius (the head of the U.S. delegation) that the right of self-defense under Article 51 should not be triggered only when there was an "armed attack."[186] Eden reportedly indicated that the United Kingdom might wish to act in self-defense against potential measures undertaken by the USSR to expand its influence in Europe and the Mediterranean.[187]

Consequently, Eden wanted Article 51 to allow self-defense against measures that fell short of direct aggression. Stettinius, however, refused to drop the reference to "armed attack," saying that a broader phraseology would allow states too great a leeway, including the right to preventive actions, which could destroy the viability of the United Nations.[188] Indeed, Stettinius reportedly noted that both World War I and World War II had begun with preventative attacks. In the face of Stettinius' refusal, the United Kingdom backed down.[189] To the extent that resort is made to such history, international lawyers should consider whether similar exchanges and attitudes could be found among the other delegations to the San Francisco Conference.

V. CONCLUSION

To the extent that the intervention in Iraq in 2003 is regarded as an act of preemptive self-defense, the aftermath of that intervention may presage an era where states resist resorting to large-scale preemptive self-defense. The intervention in Iraq highlighted considerable policy difficulties with the resort to preemptive self-defense: an inability to attract allies; the dangers of faulty intelligence regarding a foreign state's weapons programs and relations with terrorist groups; the political, economic and human costs in pursuing wars of choice; and the resistance of a local populace or radicalized factions to what is viewed as an unwarranted foreign invasion and

occupation. Preemptive self-defense may continue to be used by powerful states, however, especially on a smaller scale, such as missile attacks against weapons facilities or terrorist camps in "rogue" states.

Resort to such force is "channeled and disciplined by the notions that members of a society share about when force is legitimate and what kinds of goals it can achieve."[190] In part, those notions are captured by the norms of international law because, over time, war has become perceived not as an honorable undertaking by states, but as a necessary evil, one to be avoided except as a matter of last resort and one that is now circumscribed by legal and multilateral frameworks.[191] Policy-makers considering a resort to preemptive self-defense want to know whether such force will be regarded as internationally lawful as a means of predicting its costs and may avoid or at least shape the action to minimize those costs.

Unfortunately, the views of international lawyers are fractured on whether preemptive self-defense is lawful.[192] Numerically, most international lawyers appear to fall into the schools of thought that reject preemptive self-defense, but the debate is robust and will no doubt continue.[193] As it continues, this essay urges international lawyers to focus more on the theory and methodology they employ in reaching their conclusions.[194] Too often, international lawyers are not explaining the basic legal theory they are using for their analysis.[195] To the extent that state practice since 1945 is a part of that legal theory, international lawyers usually do not articulate the methodology that they believe is appropriate for assessing incidents of intervention, nor why that methodology is superior to other methodologies, prior to embarking on such assessments.[196] The discourse among international lawyers is uneven, not joined, and at times breezy. The notion of preemptive self-defense raises certain difficult issues of methodology, several of which have been noted in this essay.[197] Only by grappling squarely with such issues of theory and methodology will international lawyers be able to achieve a greater level of convergence in their views, thereby providing policymakers with better guidance and laying the groundwork for more stable international rules on the use of force.

NOTES

1. See generally *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (2004) (providing account of events leading up to and including terrorist attacks of September 11, 2001).
2. See, e.g., Amy F. Woolf, Congressional Research Service, Nuclear Weapons in Russia: Safety, Security, and Control Issues, CRS Issue Brief (updated Aug. 15, 2003), http://www.fas.org/spp/starwars/crs/IB98038.pdf (explaining potential safety issues regarding nuclear weapons security and storage in former Soviet Union).
3. See Jonathan B. Tucker, Biosecurity: Limiting Terrorist Access to Deadly Pathogens, 52 *Peaceworks* 1, 15-18 (2003), http://www.usip.org/pubs/peaceworks/pwks52.pdf (discussing potential sources of biological agents used in manufacture of biological weapons).
4. See T.R. Reid, Japanese Police Arrest Key Cult Figure; Media Reports Say 25-Year-Old Planned Lethal Subway Gas Attack, *Wash. Post*, May 15, 1995, at A13 (describing circumstances and facts surrounding Tokyo subway gas attack).
5. See Matthew Brzezinski, Fortress America: On the Front Lines of Homeland Security--An Inside Look at the Coming Surveillance State 8, 220 (2004) (noting vulnerabilities of United States); see also Stephen Flynn, America the Vulnerable: How Our Government is Failing to Protect Us from Terrorism 81-110 (2004) (discussing vulnerability of United States to terrorist attack via shipping containers coming through American ports).
6. See, e.g., *Anonymous, Imperial Hubris: Why the West is Losing the War on Terror* 152-58 (2004) (describing analysis by anonymous Central Intelligence Agency official of al Qaeda's determination to use WMD against United States); see also Bill Miller & Christine Haughney, Nation Left Jittery by Latest Series of Terror Warnings, *Wash. Post*, May 22, 2002, at A1 (reporting U.S. Secretary of Defense Donald H. Rumsfeld's statement that terrorists will inevitably obtain WMD and U.S. Homeland Security Director Tom Ridge's statement that additional terrorist attacks are "not a question of if, but a question of when"). Al Qaeda has already carried out post-September 11 attacks in Bali, Casablanca, Chechnya, Iraq, Istanbul, Madrid, Philippines, Riyadh and Thailand. See *Anonymous*, supra, at 91-100 (listing numerous attacks carried out by Al Qaeda around world since September 11 attacks).
7. See The National Security Strategy of the United States of America 15 (2002), http://www.whitehouse.gov/nsc/nss.pdf [hereinafter National Security Strategy] (asserting that international law has recognized need for nations to defend themselves against states that present imminent danger and that United States maintains option of preemptive actions against serious dangers to national security); see also Commencement Address at the United States Military Academy in West Point, New York, 38 Weekly Comp. Pres. Doc. 944, 946 (June 10, 2002) ("[O]ur security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives."); National Strategy to Combat Weapons of Mass Destruction 3 (2002), http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf (arguing that in order for counter-terrorism measures to be effective, U.S. military forces must have ability to preemptively attack WMD-armed adversaries, destroying WMD before they can be used); Secretary of Defense Donald H. Rumsfeld, Annual Report to the President and the Congress 30 (2002), http://www.defenselink.mil/execsec/adr2002/index.htm (evaluating lessons that should be learned by United States following events of September 11, 2001 and military campaign in Afghanistan, including lesson that "defending the United States requires prevention and sometimes preemption"); Richard N. Haass, Sovereignty: Existing Rights, Evolving Responsibilities, Remarks at Georgetown University (Jan.

14, 2003), at http://www.state.gov/s/p/rem/2003/16648.htm (asserting that United States must take preventative measures to prevent failure of states and consequences that follow).

8. National Security Strategy, supra note 7, at 15.
9. Joint Resolution Authorizing the Use of Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498, 1499 (2002); see *Carl E. Behrens, Congressional Research Service, Nuclear Nonproliferation Issues, CRS Issue Brief* (updated June 21, 2004), http://www.fas.org/spp/starwars/crs/IB10091.pdf ("If nonproliferation and deterrence fail, the Defense Department could be ordered to use military force to destroy weapons of mass destruction.").
10. See Transcript: First Presidential Debate (Sept. 30, 2004), http://www.washingtonpost.com/wp-srv/politics/debatereferee/debate_0930.html (debating issues of foreign policy). Asked for his "position on the whole concept of preemptive war," Senator John Kerry answered: The president always has the right, and always has had the right, for preemptive strike. That was a great doctrine throughout the Cold War. And it was always one of the things we argued about with respect to arms control. No president, though [sic] all of American history, has ever ceded, and nor would I, the right to preempt in any way necessary to protect the United States of America. Id.
11. For a discussion of the repercussions of violating international law on preemptive self-defense, see infra notes 15-17 and accompanying text.
12. 12. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).
13. See id. at 103.
14. For a discussion of the different views of the legality of preemptive self-defense, see infra notes 18-70 and accompanying text.
15. For a discussion of methodological problems in assessing state practice, see infra notes 71-192 and accompanying text.
16. The International Court of Justice ("ICJ") has only occasionally received cases concerning transnational use of force, although currently the ICJ has before it a case arising from an alleged invasion of the Democratic Republic of Congo by Uganda in 1998. See International Court of Justice: Current Docket of the Court, http://www.icj-cij.org/icjwww/idocket.htm (showing list of cases currently awaiting adjudication before ICJ) (last accessed March 15, 2005).
17. For a detailed discussion of the United States and the difficult problems that arise in its adherence to international norms on the use of force, see *John F. Murphy, The United States and the Rule of Law in International Affairs* 142-71 (2004) (discussing historical examples of American use of force and relating those examples to problems under international law); see also John E. Noyes, American Hegemony, U.S. Political Leaders, and General International Law, 19 *Conn. J. Int'l L.* 293 (2004) (arguing that international law "has some purchase on top U.S. officials"). F-4
18. For a discussion of the four different schools of thought regarding preemptive self-defense, see infra notes 19-70 and accompanying text.
19. For example, Thomas Franck at one time lamented the apparent death of Article 2(4), thus placing him in the "Charter-is-dead" school. See generally Thomas M. Franck, Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States, 64 *Am. J. Int'l L.* 809 (1970) (discussing demise of Article 2(4)). For a discussion of the "Charter-is-dead" school, see infra notes 69-70 and accompanying text. After the U.S. intervention in Iraq in 2003, Franck asserted that Article 2(4) "has died again," but then deployed arguments suggesting that he really falls into the "imminent threat" school and rejects the reasoning of the "qualitative threat" school. See Thomas M. Franck, What Happens Now? The United Nations After Iraq, 97 *Am. J. Int'l L.* 607, 610, 619 (2003) [hereinafter What Happens Now?] (asserting that doctrine preemptive self-defense as articulated by Bush Administration "would stand the Charter on its head"). For

a discussion of the "imminent threat" and the "qualitative threat" schools, see infra notes 38-68 and accompanying text.

20. See *U.N. Charter* art. 2, para. 4, 59 Stat. 1031, 1037, T.S. No. 993 [hereinafter *U.N. Charter*] (providing that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations").
21. See International Treaty Providing for the Renunciation of War, August 27, 1928, 46 Stat. 2343, 2345-46, 94 L.N.T.S. 57 (providing that "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another").
22. There are other norms of international law prohibiting uses of force such as norms embedded in regional charters. See, e.g., Charter of the Organization of African Unity, done May 25, 1963, preamble, arts. II-III, 479 U.N.T.S. 39, available at http://www.africa-union.org/home/Welcome.htm (asserting that key principle of African Union was respect for sovereignty of each state and noninterference in their affairs) (The OAU Charter was recently superseded by Charter of the African Union). In the Nicaragua case, the ICJ identified additional, related norms under customary international law in the form of a prohibition on the violation of a state's sovereignty and a prohibition on F-5 intervention in the affairs of another state. See Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 106-09, 111, 212 (June 27) (discussing non-intervention principle in customary international law including prohibition on violation of state's sovereignty and prohibition on intervention in affairs of another state); *Ian Brownlie, International Law and the Use of Force by States 26*-49 (Oxford Univ. Press 1963) (looking at justifications for historical examples of nations resorting to war and examining customary reasons for using force under international law); *Henry Wheaton, Elements of International Law* § 290 (A.C. Boyd, ed., Stevens and Sons 1889) (describing circumstances under which it is acceptable for states to resort to force for redress, including embargoes and taking forcible possession of "things in controversy").
23. See *Brownlie*, supra note 22, at 265-68 (arguing that Article 2(4) cannot be given meaning that allows nation to use force so long as nation simply states that it has no intention of infringing on other state's territorial integrity; provision must be read more broadly than that*); 1 The Charter of the United Nations: A Commentary* 123-24 (Bruno Simma ed., Oxford Univ. Press, 2d ed. 1994) (arguing that any interpretation of Article 2(4) that permits states to use force is incompatible with purpose of provision and is therefore untenable); *La Charte des Nations Unies: Commentaire Article par Article* 125 (J. Cot & A. Pellet eds., 2d ed. 1991); *Leland Goodrich & Edvard Hambro, Charter of the United Nations: Commentary and Documents* 44-45 (World Peace Foundation, 3d ed. 1969) (asserting that Article 2(4) was designed to prevent armed conflict, leaving very few exceptions to that goal); *Oscar Schachter, International Law in Theory and Practice* 112-13 (1991) (discussing interpretations of Article 2(4) and noting that its words qualify as all-inclusive prohibition against force but that extent of this prohibition is not clear from textual analysis alone); C. Humphrey Waldock, The Regulation of the Use of Force by Individual States in International Law, ***81*** *R.C.A.D.I.* 451, 493 (1952-II).
24. See generally *Erika de Wet, The Chapter VII Powers of the United Nations Security Council* 133-49 (2004) (discussing power of Security Council under Chapter VII and "the threshold that triggers Chapter VII action"); see also *U.N. Charter*, supra note 19, art. 39-51, 59 Stat. at 1043-45, T.S. No. 993 (setting forth U.N. procedures for handling threats to peace, breaches of peace, and acts of aggression, including Security Council authorization of use of force against states that aggressively threaten peace).
25. *U.N. Charter*, supra note 19, art. 51, 59 Stat. at 1044-45, T.S. No. 993. In its entirety, the article reads: Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an

armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of selfdefense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. Id.

26. For a detailed presentation of strict constructionist views, see infra notes 27-36 and accompanying text.
27. *Brownlie*, supra note 22, at 278; see *Hans Kelsen, The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* 797-98 (Stevens & Sons 1950) (arguing that Article 51's allowance of use of force in self-defense applies only when nation faces actual armed attack, and therefore, no "imminent" threat of attack can justify armed aggression under Article 51); *Lassa Oppenheim, International Law* vol.2, 156 (H. Lauterpacht, ed., Longmans, Green and Co., 7th ed., 1952) (noting that U.N. Charter "confines the right of armed self-defence to the case of an armed attack as distinguished from anticipated attack or from various forms of unfriendly conduct falling short of armed attack"); Hans Wehberg, L'Interdiction du Recours á la Force: Le Principe et les Problèmes qui se Posent, 78 *R.C.A.D.I.* 1, 81 (1951) (finding that self-defense under Article 51 is impermissible "en cas de simple menace d'agression").
28. Philip Jessup, A Modern Law of Nations 166 (Archon Books 1968).
29. Louis Henkin, International Law: Politics, Values and Functions 156 (1990).
30. Yoram Dinstein, War, Aggression and Self-Defence 167 (Cambridge Univ.Press 3d ed. 2001); see 1 The Charter of the United Nations: A Commentary, supra note 22, at 676 ("An anticipatory right of self-defence would be contrary to the wording of Art. 51 ('if an armed attack occurs')…"); id. n.138 (citing authorities disfavoring anticipatory self-defense or preemptive self-defense); Report of the Secretary-General's High Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility 63 (2004) ("[I]f there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to."). At the same time, Dinstein would allow for self-defense in a situation where an attacker "has committed itself to an armed attack in an ostensibly irrevocable way" even if the attacker has not crossed the frontier, although he is unclear how one would judge that such an attack is irrevocably underway. See Dinstein, supra, at 172 (arguing for legitimacy of "interceptive" self-defense under Art. 51 with belief that it would be preposterous to force nation to endure potentially crippling first strike simply to preserve their absolute right to self-defense).
31. See Military and Paramilitary Activities in and against Nicaragua (Nicar. v.U.S.), 1986 I.C.J. 14, 101 (June 27) ("[I]t will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."); see also Concerning Oil Platforms (Islamic Republic of Iran v. U.S.), 2003 I.C.J. 161, 187-88 (Nov. 6) (ruling that in order for nation to attack another nation, it must show that there was armed attack for which other nation is responsible). As noted previously, the ICJ in Military and Paramilitary Activities in and against Nicaragua said that it was not expressing a view with respect to the right to defend against an imminent attack. For a discussion of Military and Paramilitary Activities in and against Nicaragua, see supra note 13 and accompanying text. The ICJ, however, confirmed that states do not have a right of individual or collective armed response to acts that do not constitute an "armed attack." See Military and Paramilitary Activities in and against Nicaragua, 1986 I.C.J. at 103, 110 (noting that for one state to legally use force against another because of other's own act, that act in question must be an armed attack). In doing so, the ICJ did not provide a complete definition of what constituted an"armed attack." On the one hand, the ICJ implied that a "mere frontier incident" does not constitute an "armed attack" and stated that providing assistance to rebels in the target state in the form

of weapons or logistical or other support did not constitute an "armed attack." See id. at 103-04. On the other hand, the ICJ considered an "armed attack" as occurring when regular armed forces cross an international border, or when a state sends armed bands, groups, irregulars or mercenaries that carry out acts of armed force against another state of sufficient gravity so as to equate with an actual armed attack by regular forces. See id. at 103 (describing actions by state that would constitute armed attack according to ICJ); see also *1 The Charter of the United Nations: A Commentary*, supra note 22, at 670 (noting that "armed attacks" must be "military actions [that] are on a certain scale and have a major effect, and are thus not to be considered mere frontier incidents"); *Dinstein*, supra note 30, at 173-74 ("There is no doubt that, for an illegal use of force to acquire the dimensions of an armed attack, a minimal threshold has to be reached …in the absence of an armed attack, self-defense is not an option available to the victim State...").F-8

32. For a discussion of the meaning of "armed attack," see supra note 31 and accompanying text.
33. See, e.g., Louis Henkin, The Reports of the Death of Article 2(4) Are Greatly Exaggerated, 65 *Am. J. Int'l L.* 544, 545 (1971) (looking to Korean War, President Kennedy's response to Cuban Missile Crisis in 1962 and War in Vietnam as examples of state action after ratification of United Nations Charter).
34. Louis Henkin, How Nations Behave: Law and Foreign Policy 141 (2d ed., 1979) [hereinafter How Nations Behave]; see Antonio Cassese, International Law 309 (001) [hereinafter Cassese, International Law] ("If one undertakes a perusal of State practice …it becomes apparent that such practice does not evince agreement among States regarding the interpretation or the application of Article 51 with regard to anticipatory self-defence."); Henkin**,** supra note 29, at 156 ("The permissive interpretation of Article 51 has found little favour with Governments."). But see Antonio Cassese, International Law in a Divided World 230-36 (Clarendon Press 1986) (arguing that consensus is growing for allowing anticipatory self-defense).
35. Christine Gray, International Law and the Use of Force 115 (Malcolm Evans & Phoebe Okowa, eds., 2000). By 2004, Gray was less certain about this "trend," and modified her treatise to speak of a clear trend before the terrorist attacks of September 11. See Christine Gray, International Law and the Use of Force 133 (2d ed. 2004) [hereinafter Gray 2d ed.] ("The clear trend in state practice before 9/11 was to try to bring the action within Article 51 and to claim the existence of an armed attack rather than to argue expressly for a wider right under customary international law.").
36. *Cassese, International Law*, supra note 34, at 310-11.
37. For a listing of authorities falling into this school, see *1 The Charter of the United Nations: A Commentary*, supra note 22, at 666 n.28.
38. See *D.W. Bowett, Self-Defence in International Law* 187 (Manchester Univ. Press 1959) (stating reference to "inherent right" in Article 51 indicates "an existing right, independent of the Charter and not the subject of an express grant"). F-9
39. For a pre-1945, and thus pre-U.N. Charter, example of defense against an imminent threat, see infra note 40 and accompanying text.
40. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), quoted in 2 *John Bassett Moore, A Digest of International Law* 412 (1906). The incident involved an assertion by the United Kingdom that its attack in U.S. territory on the schooner Caroline was permissible self-defense because the schooner had previously been used (and might be used again) to ferry supplies across the border to Canada to rebels who were fighting U.K. rule in Canada. See *Moore, supra, at 409-412; see also Daniel Webster, The Works of Daniel Webster* 292-303. Webster rejected the U.K. assertion, observing that at the time of the attack, the Caroline was not engaged in or being prepared for such transport. In support of his views, Webster cited to eminent scholars of international law, including Grotius, Pufendorf, and Vattel. For a view that

anticipatory self-defense did not exist even under pre-Charter customary international law, see Roberto Ago, Addendum to Eighth Report on State Responsibility, [1980] II (1) *Y.B. Int'l L. Comm'n.* 13, at 65-67, U.N. Doc. A/CN.4/333.

41. See, e.g., *Bowett*, supra note 38, at 188-89 (1959) (arguing that Article 51definitely allows right to self-defense and that this right has always presumed to be anticipatory); Jutta Brunnée & Stephen J. Toope, The Use of Force: International Law After Iraq, 53 *Int'l & Comp. L.Q.* 785, 792 (2004) (asserting that Article 51 permits anticipatory self-defense, as matter of customary law, so long as it is proportionate response to threat).
42. See Brunnée & Toope, supra note 41, at 792 (claiming that even though Article 51 specifically refers to armed attack, there is no impairment of right of anticipatory self-defense when attack is imminent).
43. See *J.L. Brierly, The Law of Nations* 419 (H. Waldock ed., 6th ed. 1963) (analyzing other interpretations of French text and finding room for uncertainty in interpretation).
44. For a further discussion of the inherent right to self-defense as included in Article 51 of the United Nations Charter, see supra notes 41-43 and accompanying text.
45. *How Nations Behave, supra note 34, at 143-44; see Julius Stone, Aggression and World Order* 99 (1958). The author posits: Suppose military intelligence at the Pentagon received indisputable evidence that a hostile State was poised to launch intercontinental ballistic missiles, at a fixed zero hour only 24 hours ahead, against New York, Boston and Washington, would it be an aggressor under the Charter if it refused to wait until those cities had received the missiles before it reacted by the use of force? Id.
46. For a discussion of these incidents, see Christopher Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 *W. Va. L. Rev.* 933 (1986) (discussing situation surrounding air attack, domestic and world reaction to air strike, claim by United States that act was justified under article 51 of United Nations Charter and other justifications for attack); William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 *Va. J. Int'l L.* 421, 464-65 (1990) (summarizing position of United States and its allies versus position of many Third World and Communist States).
47. For a further discussion of these attacks and the international legal issues implicated by them, see supra note 46 and accompanying text.
48. For a discussion of the views of one adherent to the imminent threat school regarding the acceptability of the use of force in the face of an imminent armed attack, see infra note 49 and accompanying text.
49. *Thomas M. Franck, Recourse to Force: State Action Against Threats and Armed Attacks 107 (2002) [hereinafter Recourse to Force];* What Happens Now?, supra note 19, at 619 ("The principle of anticipatory self-defense has been known to international law for almost two centuries and has gained a certain credibility, despite the restrictive terms of Charter Article 51. This credibility is augmented both by contemporary state practice and by deduction from the logic of modern weaponry."). F-11
50. See What Happens Now?, supra note 19, at 619 (finding Bush Administration's doctrine of preemptive self-defense to be expanding exponentially range of permissible action); Georg Nolte, Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order, 5 *Theoretical Inquiries in L.* 111 (2004). (arguing that Bush doctrine and Israeli policy of "targeted killing" risk transforming indispensable foundations of international law on use of force and human rights).
51. See Michael Bothe, Terrorism and the Legality of Pre-emptive Force, 14 *Eur. J. Int'l. L.* 227, 238 (2003) (asserting that creating a rule that did not provide a "workable definition of permissible force might end the abolition of the prohibition of the use of force altogether"); *Michael Walzer, Just and Unjust Wars* 74-75 (2000) (analyzing the Webster formulation as supporting only action against an imminent threat).
52. The failure of the U.S. intelligence community to assess accurately Iraq's WMD capability is described in *Senate Select Committee on Intelligence, Report on the U.S. Intelligence Community's Prewar Intelligence*

Assessments on Iraq (July 7, 2004), available at http://intelligence.senate.gov/iraqreport2.pdf. (analyzing pre-war intelligence regarding Iraq's weapons of mass destruction programs and Iraq's connection to terrorism). For a discussion of how intelligence can be manipulated, see generally *James Bamford, A Pretext for War: 9/11, Iraq, and the Abuse of America's Intelligence Agencies (2004*).

53. The ICJ has stated: The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States): "There is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law." (I.C.J. Reports 1986, p. 94, para. 176). This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8) [hereinafter Nuclear Weapons Advisory Opinion; see Concerning Oil Platforms (Islamic Republic of Iran v. U.S.), 2003 I.C.J. 161, 187-88 (Nov. 6) ("The United States must also show that its actions were necessary and proportional to the armed attack made on it."). Discussions of necessity and proportionality also often refer to the Caroline incident since Secretary of State Daniel Webster analyzed those elements as cornerstones of the legal doctrine of self-defense. See 29 *British & Foreign State Papers* 1129, 1138 (1937).
54. See, e.g., *Gray* 2d ed., supra note 35, at 121 (noting that necessity and proportionality are both required aspects of actions taken in self-defense and that such action is necessary and proportionate only if it is taken to repel or stop attack, and not for punitive or retaliatory measures). There is a link between the F-14 customary rules on necessity and proportionality between the jus ad bellum and the jus in bello. See generally Christopher Greenwood, The Relationship Between Jus Ad Bellum and Jus in Bello, 9 *Rev. Int'l Stud.* 221 (1983). Thus, the Lieber Code's definition of necessity states: "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war." Francis Lieber, Instructions for the Government of the Armies of the United States in the Field, in *Dietrich Schindler & Jirí Toman, The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents 3, at* 6 (3d ed. 1988).
55. See, e.g., Concerning Oil Platforms, 2003 I.C.J. 161, 198-99 ("In this connection, the Court notes that there is no evidence that the United States complained to Iran of the military activities of the platforms, …which does not suggest that the targeting of the platforms was seen as a necessary act.").
56. See Judith Gail Gardam, Proportionality and Force in International Law, 87 *Am. J. Int'l L.* 391, 391 (1993). The author states: The resort to force… is limited by the customary law requirement that it be proportionate to the unlawful aggression that gave rise to the right. In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy. Id. Thus, in the Oil Platforms case, the ICJ decided that even if Iran had laid a mine that severely damaged a U.S. warship, responding to that mining with a military operation that destroyed two Iranian frigates and a number of other Iranian naval vessels and aircraft, could not be regarded as proportionate selfdefense. See Concerning Oil Platforms, 2003 I.C.J. at 198-99 ("As a response to the mining …of a single United States warship …neither "Operation Praying Mantis" as a whole, nor even that part of it that destroyed the [platforms], can be regarded, in the circumstances of this case, as a proportionate use of force in self defence.").
57. For a further discussion of the beliefs and arguments of the imminent threat school, see supra notes 37-56 and accompanying text.

58. See Mary Ellen O'Connell, The Myth of Preemptive Self-Defense 19-20, Aug. 2002, (ASIL Task Force on Terrorism), available at http: F-15 http://www.asil.org/taskforce/oconnell.pdf. (pointing out that only by taking over another country wholly and eliminating its government can one country be sure that another will not attack).
59. See *Myres S. McDougal & Florentino P. Feliciano, Law and Minimum World Public Order 217* (1961) (examining requirements of self-defense: necessity and proportionality). Abraham Sofaer argues that the Caroline standard of responding against a threat that is "'instant, overwhelming, and leaving no choice of means'" should be limited only to situations where "the state from which attacks are anticipated is not responsible for the threat, and is both able and willing to suppress them." Abraham D. Sofaer, On the Necessity of Preemption, 14 *Eur. J. Int'l L.* 209, 219-220 (2003). In all other situations, Sofaer believes that anticipatory or preemptive self-defense is simply governed by the principles of necessity and proportionality. See id. at 320 (noting that "[T]he standard generally applicable to pre-emptive self-defence is, rather, the same general rule applicable to all uses of force: necessity …together with the requirement that any action be proportionate to the threat addressed.").
60. In 1962 President Kennedy stated: We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace. President John F. Kennedy, Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba, 485 *Pub. Papers* 806, 807 (Oct. 22, 1962).
61. See, e.g., Sofaer, supra note 59, at 220 (finding necessity to act and proportionality to be proper standard, with several factors determining necessity, including: nature and magnitude of threat, likelihood threat will be realized, availability and exhaustion of other alternatives and whether use of force is consistent with UN Charter and other international law); John Yoo, International Law and the War in Iraq, 97 *Am. J. Int'l L.* 563, 572, 574 (2003) (examining Caroline test in light of weapons of mass destruction and finding that current test has become significantly more nuanced than Webster's Caroline definition).
62. Most international lawyers do not focus on the magnitude of harm to the victim, but in the Nuclear Weapons Advisory Opinion, supra note 53, at 262-63, 266, the ICJ accepted that fundamental rules of international law change "in an F-16 extreme circumstance of self-defence, in which the very survival of a State would be at stake." See id. at 262-63.
63. See W. Michael Reisman, Assessing Claims to Revise the Law of War, 97 *Am. J. Int'l L.* 82 passim (2003) (suggesting that such doctrine may contribute to world public order if subjected to appropriate criteria).
64. For background on the invasion of Panama, see Jennifer Miller, International Intervention: The United States Invasion of Panama, 31 *Harv. Int'l L.J.* 633 (1990).
65. For background on the 1993 attack on Iraq, see Alan D. Surchin, Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad, 5 Duke J. Comp. & Int'l L. 457 (1995).
66. For background on the attacks in Sudan and Afghanistan, see Jules Lobel, The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan, 24 Yale J. Int'l L. 537 (1999); Ruth Wedgwood, Responding to Terrorism: The Strikes Against bin Laden, 24 Yale J. Int'l L. 559 (1999).
67. See, e.g., Kim R. Holmes, U.S. Dep't of State Assistant Secretary for International Organization Affairs, The Future of U.S.-UN Relations, Remarks at the XXI German American Conference (June 13, 2003), at http://www.state.gov/p/io/rls/rm/2003/21913/htm. The speaker remarked: As contentious as the disagreement over Iraq was, it should not be over-emphasized. Neither the United States nor the U.K. ever asserted a right to operate outside their obligations under international law. Neither took a position that called into question the existing international legal regime related to the use of force. Each country had

lawyers examine relevant [U.N. Security Council] resolutions and clarify the legal basis for use of force before the decision to proceed was made. Id.

68. Michael J. Glennon, Preempting Terrorism: The Case for Anticipatory Self-Defense, Wkly. Standard, Jan. 28, 2002, 24, 27 [hereinafter Preempting Terrorism]; see also Michael J. Glennon, Limits of Law, Prerogatives of F-17 Power: Interventionism After Kosovo (2001) [hereinafter Limits of Law] (examining humanities effort to subject use of force to rule of law and finding that it is no longer possible to know when use of force by state is legal under international law. Currently states intervene on basis of less concrete concepts such as "justice", or simply when it serves perceived interests of state); Michael J. Glennon, The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter, 25 Harv. J.L. & Pub. Pol'y 539, 540 (2002) (noting that use of force rules in United Nations Charter have been routinely disregarded and that use of force rules are basically illusory). Professor Glennon is not alone, especially if one looks outside the realm of international lawyers to that of international relations theorists. See, e.g., Anthony Clark Arend, International Law and the Recourse to Force: A Shift in Paradigms, 27 Stan. J. Int'l L**.** 1, 28 (1990). One theorist stated: Based on what states have been saying and what they have been doing, there simply does not seem to be a legal prohibition on the use of force against the political independence and territorial integrity of states as provided in even a modified version of Article 2(4). The rule-creating process authoritative state practice has rejected that norm. Id.; see also Christine Chinkin, The State that Acts Alone: Bully, Good Samaritan or Iconoclast, 11 Eur. J. Int'l L. 31, (2000) (questioning indispensability of UN after Kosovo and finding UN's role as icon of universal collective responsibility may no longer functionally exist); John Alan Cohan, The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law, 15 Pace Int'l L. Rev**.** 283, 327 (2003) (finding that "Article 51's constraint on use of force has collapsed in actual practice.").
69. See *John G. Ruggie, Constructing the World Polity* 94 (1998) (explaining that narrative explanatory protocol comprises two "orders" of information: descriptive and configurative); John Gerard Ruggie, What Makes the World Hang Together? Neo-utilitarianism and the Social Constructive Challenge, 52 *Int'l Org.* 855-85 (1998) (discussing how modern theorizing in international relations views world in terms of actors and interests, ignoring "class of facts that do not exist in the physical object world… [facts that] depend on human agreement that they exist and typically require human institutions for their existence. Social facts include money, property rights… [and] marriage…").
70. For a further discussion of the key issues that arise in assessing methodology and state practice on this topic, see infra notes 72-191 and accompanying text. F-18
71. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, *S. Treaty Doc. No.* 92-12, 1155 U.N.T.S. 331, 340 [hereinafter VCLT] (providing general rule of interpretation of treaties, including that treaties should be interpreted in good faith, context for interpretation of treaty and other considerations that should be taken into account). The VCLT's authoritative character as law, even for states not party to it, derives from the fact that it is now generally accepted that most of its provisions are declaratory of the customary international law of treaties. See 1155 U.N.T.S. 331 (stating that Vienna Convention on law of treaties was registered "ex officio" on January 27, 1980). Although the United States has not become a party to the VCLT, it regards the substantive provisions of the VCLT as reflective of customary international law on the subject. See **S**. *Exec. Doc. L,* 92d Cong., 1st Sess., at 1 (1971) ("The convention is already generally recognized as the authoritative guide to current treaty law and practice."); *Restatement (Third) of the Foreign Relations Law of the United States* pt. III, introductory note (1987) (finding that Department of State has stated that it regards particular articles of Vienna Convention as codifying

international law, and noting that United States courts have treated various provisions of Convention as authoritative).

72. VCLT, supra note 71, art. 31(3)(b).
73. See Anthony Aust, Modern Treaty Law and Practice 185 (2000).
74. For a further discussion of the beliefs and theories of the strict constructionist school, see supra notes 19-36 and accompanying text.
75. See 1 The Charter of the United Nations: A Commentary, supra note 18, at 493-98.
76. See id. at 439.
77. G.A. Res. 377(V), G.A.O.R., 5th Sess., 302nd Plen. Mtg., U.N. Doc. A/PV.302, 341 at 347 (Nov. 3, 1950). The resolution, entitled "Uniting for Peace" in essence purports to transfer from the Security Council to the General Assembly the authority to authorize the use of force under Chapter VII, in cases where the Security Council is deadlocked. See id. F-19
78. For a further discussion of the beliefs and views held by the strict constructionist school, see supra notes 19-36 and accompanying text.
79. Treaty interpretation calls for recourse to the preparatory work of the treaty (that is, the negotiating record) only where the initial interpretation leads to an ambiguous or obscure meaning or to an absurd or unreasonable result. See VCLT, supra note 56, art. 32, 1155 U.N.T.S. at 340 (presenting procedure for treaty interpretation).
80. See, e.g., Myres S. McDougal, The Soviet-Cuban Quarantine and Self-Defense, 53 *Am. J. Int'l. L. 597*, 598-600 (1963) (referring to Caroline incident to show that necessity of self-defense does not require an actual armed attack); *Bowett, supra* note 38, at 187-190 (stating that Article 51 was intended to safeguard right of self-defence, and not restrict it and referring to Caroline as classical illustration of anticipatory self defense). While McDougal does not use the term "inherent right", he repeatedly refers to the understanding that acting in self-defense does not require an actual armed attack as the "customary right" of self-defense. See id.; see also D.W. Bowett, The Interrelation of Theories of Intervention and Self-Defense, in *Law and Civil War in the Modern World* 38, 38-40 (John Norton Moore, ed. 1974) (arguing that Article 51 was intended to preserve "traditional right" of self defense, which included right to take action against threat before actual armed attack occurred). For further discussion, see supra notes 37-58.
81. See Sofaer, supra note 59, at 213 (presenting some scholars' belief that 'push button' approach to analyzing Charter is flawed).
82. See id. at 212) (stating that current standard is "necessity" and this should be determined in light of purposes of UN Charter).
83. See id. at 213-14 (concluding that qualitative threat school believes that preemptive self-defense is only reasonable way to protect states from terrorism).
84. 1 The Charter of the United Nations: A Commentary, supra note 22, at 803.
85. For a discussion of the Charter is dead view that norms have no meaning, see supra note 68. F-20
86. See *How Nations Behave*, supra note 34, at 146 (recognizing that norm lies against use of force by states); *Martha Finnemore, The Purpose of Intervention: Changing Beliefs About the Use of Force* 7-8 (2003) ("It is precisely because states show restraint that we live in a world of sovereign states at all.").
87. See Federal Bureau of Investigation, Crime in the United States 2002: Uniform Crime Reports 19, 45 (2003) (presenting national crime statistics).
88. See Oscar Schachter, In Defense of International Rules on the Use of Force, 53 *U. Chi. L. Rev***.** 113, 130-31 (1986) (arguing that violation of laws does not mean that legal restraints on conduct do not exist).
89. See *Michael Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law* 6 (1999) (noting that use of quick, unorganized force to achieve goals has many

disadvantages, however, organized use of force backed by legal system is more efficient and safer for states to employ).

90. See *Limits of Law*, supra note 68, at 42 ("There is simply no reason to assume that state conduct necessarily is caused by perceptions as to what a treaty permits or prohibits. States act for reasons altogether unrelated to their treaty obligations.").
91. See generally *Finnemore*, supra note 88 (discussing various justifications for military intervention). Professor Finnemore analyzes rules on the use of force from a sociological perspective, meaning a perspective that explains the conduct of actors by reference to the social structures in which they are embedded. See id. (analyzing need and reasons for intervention based on surrounding social and political circumstances). Among other things, she finds that legal norms have played a key role in fundamentally changing state practice regarding the use of force. See id. (noting that legal norms play important role in nations' determinations regarding intervention).
92. For example, in the course of the decision to invade Iraq in 2003, British F-21 Prime Minister Tony Blair apparently saw considerable importance in obtaining Security Council authorization, to the point that his government was considered at risk of falling in March 2003 when it became clear that express Security Council authorization was not forthcoming. See, e.g., Karen DeYoung & Colum Lynch, Britain Races To Rework Resolution, *Wash. Post*, Mar. 11, 2003, at A1 (reporting that Blair supported amending resolution even in face of challenge to power); Glenn Frankel, Parliament Backs Blair on Action Against Baghdad, *Wash. Post*, Mar. 19, 2003, at A17 (reporting on revolt, that ultimately was defeated, in Blair's Labor Party).
93. Jus cogens refers to a fundamental or peremptory norm of international law from which states cannot deviate. See Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 100-01, (June 27) (finding that rule against use of force is "conspicuous example of a rule of international law having the character of jus cogens"); see also VCLT, supra note 56, art. 53, 1155 U.N.T.S., at 344 (stating that norm of jus cogens "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted…").
94. See *Restatement (Third) of the Foreign Relations Law of the United States §* 102 cmt. k (1987) (stating that provisions of U.N. Charter prohibiting use of force have character of jus cogens as recognized by international community).
95. See *Limits of Law*, supra note 54, at 40-42 (asking why majority of states cannot simply act to change rule that was previously accepted by international community).
96. For a discussion of the interest in state practice, see supra notes 33-35, 48, 64-66, 69, and accompanying text.
97. For a discussion of the problem of examining what states say versus examining what states do, see infra notes 101-123 and accompanying text. For a discussion of the issues surrounding identifying what states actually do, see infra notes 124-142 and accompanying text. For a discussion on how to incorporate the global reaction to a states use of force, see infra notes 143-149 and accompanying text. For a discussion of the problems of the relative infrequency of state actions and possible solutions, see infra notes 150-177 and accompanying text. For a discussion on the importance of recent versus historical state practice, particularly in light of the events of September 11th, see infra note 178 and accompanying text. For a discussion of the problems F-22 associated with resorting to the Travaux (preparatory work) of the Charter, see infra notes 179-191 and accompanying text.
98. See *Recourse to Force*, supra note 49, at 102-03.
99. See, e.g**.,** *Cassese, International Law*, supra note 34, at 308-310 (discussing rationale and conflicting views on anticipatory defense).

100. *Gray 2*d ed., supra note 35, at 130; see also Brunnée & Toope, supra note 32, at 790-91 ("For the purposes of assessing the fit of an action within a normative framework, however, one must focus upon justifications actually offered rather than suspected motivations.").
101. ***See Gray*** 2d ed., supra note 35, at 130-31 (stating that "the point of importance is that Israel did not rely on anticipatory self-defence to justify its actions").
102. States have not always submitted a report to the Security Council when they have used force against other states. See Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 121 (June 27). The United States' failure to report to the Security Council in this manner during the actions at issue in the Nicaragua case, however, led the ICJ to observe "that this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter," and thus contributed to the ICJ's finding that the United States was not acting in self-defense. See id. Consequently, since that time the United States typically has submitted such reports to the Security Council when undertaking a use of force. See *Gray* 2d ed., supra note 35 at 102-103 (discussing how after Nicaragua case states regularly report actions to Security Counsel, and in fact now tend to over-report claims and noting that United States chose to report and thus justify each episode of use of force against Iran during period of conflict between Iraq and Iran).
103. For trenchant criticisms in this regard, see Glennon, Limits of Law, supra note 69, at 44-46, 56-58, 76-78, & 80.
104. *See Recourse to Force,* supra note 49, at 102-03 (finding that Security Counsel gave credence to argument to anticipatory self-defense by not censuring Israeli action in any of its resolutions on issue); see *Cassese, International Law,* supra note 34, at 308 ("Israel has resorted to anticipatory self-defence on various occasions: for example in 1967 against Egypt…").
105. See, e.g., Richard N. Gardner, Neither Bush nor the "Jurisprudes," 97 *Am.J. Int'l L.* 585, 587-88 (2003) (discussing idea that because United Stated did not justify Cuban quarantine on grounds of preemptive self-defense, it cannot be used as precedent); see also *Abram Chayes, The Cuban Missile Crisis: International Crises and the Role of Law* 62-66 (1974) (stating that preemptive self-defense argument was continually rejected as justification for quarantine).
106. See, e.g., *Recourse to Force, supra* note 49, at 99-101 (looking past Unites States's stated reasons to its actions).
107. See, e.g., Yoo, supra note 61, at 573 (positing that United States' justification for Cuban quarantine was not credible and that preemptive selfdefense was true ground for action).
108. See generally *Harold D. Lasswell & Myres S. McDougal, Jurisprudence for a Free Society: Studies in Law, Science and Policy (*1992) (discussing how states use stated rules to set forth their own policy). The New Haven school would see the function of rules on the use of force as "not mechanically to dictate specific decision but to guide the attention of decision-makers to significant variable factors in typical recurring contexts of decision, to serve as summary indices to relevant crystallized community expectations, and, hence, to permit creative and adaptive, instead of arbitrary and irrational, decisions." *McDougal & Feliciano,* supra note 59, at 57.
109. For a discussion of the issues surrounding identifying what states actually do, see infra notes 124-142 and accompanying text.
110. See O'Connell, supra note 44, at 3 (concluding that, because of national values and need for national security, United States has taken strong position against preemptive self-defense).
111. See Preempting Terrorism, supra note 54, at 25 (noting that in 1986, United States claimed right to use preemptive self-defense against Lybia following F-24 terrorist attack in Berlin).

112. See generally *John Lewis Gaddis, Surprise, Security, and The American Experience* (2004) (arguing that with end of U.S.-French alliance in 1800, fledgling United States had to defend itself against real threats and did so by acting unilaterally and preemptively).
113. See *Gray* 2d ed., supra note 35 at 177 (noting that opposition by many states to Operation Iraqi Freedom makes it clear that many states were not willing to accept pre-emptive self-defense as legal basis for operation).
114. George W. Bush, Address to the Nation on Iraq, 39 *Weekly Comp. Pres. Doc.* 342, 343 (Mar 19, 2003).
115. See, e.g., *Congressional Research Service, U.S. Use of Preemptive Military Force, CRS Report RS21311* (updated Apr. 11, 2003) ("The President did not explicitly characterize his military action as an implementation of the expansive concept of preemptive use of military force against rogue states with WMD contained in his National Security Strategy document of September 2002.").
116. See Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/351 (2003) ("The actions being taken are authorized under existing Council resolutions."); see also George W. Bush, Address to the Nation on Iraq, 39 *Weekly Comp. Pres. Doc*. 338, 339 (Mar. 17, 2003) ("Under Resolutions 678 and 687, both still in effect, the United States and our allies are authorized to use force in ridding Iraq of weapons of mass destruction. This is not a question of authority. It is a question of will."); U.N. SCOR, 58th Sess., 4726th mtg. at 25, U.N. Doc. S/PV.4726 (Resumption 1) (2003) (statement of U.S. Permanent Representative to United Nations to Security Council) ("Resolution 687 (1991) imposed a series of obligations on Iraq that were the conditions of the ceasefire. It has long been recognized and understood that a material breach of those obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990)."); William H. Taft, IV & Todd F. Buchwald, Preemption, Iraq, and International Law, 97 *Am. J. Int'l L.* 557, 563 (2003) (containing essay by State Department Legal Adviser and his assistant basing legality of invasion on Security Council resolutions, but also stating that "a principal objective" of coalition forces in context of those resolutions was to preempt Iraq's possession and use of WMD); Holmes, supra note 68 ("The decision to go to war with Iraq was based on international law: Existing Security Council resolutions against Iraq provided a sufficient legal basis for military action."); William H. Taft, IV, U.S. Dep't of State Legal Adviser, Remarks Before the National Association of Attorneys General 15-16 (Mar. 20, 2003), at http://usinfo.state.gov/regional/nea/iraq/text2003/032129taft.htm. ("Under international law, the basis for use of force is equally strong. There is clear authorization from the Security Council to use force to disarm Iraq."). For my analysis of this legal theory, finding it plausible but ultimately unpersuasive, see Sean D. Murphy, Assessing the Legality of Invading Iraq, 92 *Geo. L.J. 173* (2004).
117. For the Australia letter to the Security Council, see Letter Dated 20 March 2003 From the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council, U.N. SCOR, 58th Sess., U.N. Doc. S/2003/352 (2003). For the U.K. letter to the Security Council, see Letter Dated 20 March 2003 From the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. SCOR, 58th Sess., U.N. Doc. S/2003/350 (2003). For the legal analysis of the U.K. Attorney-General, see Current Development: Public International Law, 52 *Int'l & Comp. L.Q.* 811, 811-12 (statement by U.K. Attorney-General Lord Goldsmith in answer to parliamentary question in House of Lords). Although Spain did not contribute troops to the invasion, it supported, as a Security Council Member, the legal theory advanced by the United States and its allies. See U.N. SCOR, 58th Sess., 4721st mtg. at 15-16, U.N. Doc. S/PV.4721 (2003) (explaining its support for United States with regard to "alleviat[ing] the suffering of the Iraqi people."). For Poland, which was not a Member of the Security Council, but did contribute forces, see

U.N. SCOR, 58th Sess., 4726th mtg. at 24-25, U.N. Doc. S/PV.4726 (2003) (expressing its alignment with European Union because of desire to remove Iraq's weapons of mass destruction, "which threaten international peace and security").

118. See, e.g., Bush, supra note 117, at 339 ("The United States of America hasthe sovereign authority to use force in assuring its own national security."); see also Letter Dated 20 March 2003 From the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, supra note 117, at 2 ("The actions that coalition forces are undertaking… are necessary steps to defend the United States… from the threat posed by Iraq..."); see also Taft, supra note 117 ("The President may also, of course, always use force under international law in self-defense."). F-26
119. See, e.g., Brunnée & Toope, supra note 41, at 794 (noting some commentators' arguments that "an intervention in Iraq could not be justified as self-defence").
120. See, e.g., Michael N. Schmitt, Preemptive Strategies in International Law, 24 *Mich. J. Int'l L.* 513, 547-48 (2002-03) (finding that "the controversy centers on whether the situation was ripe for a U.S. military preemptive operation, not the legality of such an operation in the abstract").
121. Standard theories of customary international law call for an analysis of both state conduct and opinio juris, which is a belief by the state's decision-makers that the conduct is lawful. See *G.J.H. van Hoof, Rethinking the Sources of International Law* 85-113 (Kluwer Law & Taxation Publishers 1983) (discussing custom as it pertains to international law); see also *Mark E. Villiger, Customary International Law and Treaties* 11-63 (Kluwer Law International 1997) (explaining how to analyze state actions and how to determine rationale behind these actions). As noted above, however, it often is not clear whether international lawyers are engaging in an analysis of emergent customary international law, as opposed to an interpretation of a treaty based on subsequent state practice. See id. at 29-37 (differentiating between customary interpretations of international rules and digressions from them).
122. Some observers think that the driving motivation of influential persons in the Bush Administration was not to deal with an urgent and imminent danger to the United States but, rather, to establish a democracy in Iraq that would help in democratizing the whole Islamic world. See *Stefan Halper & Jonathan Clarke, America Alone: The Neo-Conservatives and the Global Order* 218-19 (2004) (suggesting that if Bush Administration could democratize Iraq, other Middle Eastern powers would follow Iraq's lead); see also *James Mann, Rise of the Vulcans: The History of Bush's War Cabinet* 346 (Viking 2004) ("Some of the Vulcans hoped that in overthrowing Saddam Hussein, the United States could turn Iraq into a model for democracy that would transform Arab political culture and the politics of the entire Middle East…").
123. See *Limits of Law*, supra note 69, at 46 ("International lawyers pine for better ways to get 'into the heads' of state decision makers… [but] many of those decision makers, if at all candid, would reply 'Who cares?' or 'There's no such thing.'"). F-27
124. See, e.g., *Gray* 2d ed., supra note 35, at 121 ("States have invoked collective self-defence as a justification for inviting in foreign troops before any armed attack has occurred, in case collective self-defence is needed in the future; that is, as a deterrent or as a precaution."); see also *1 The Charter of the United Nations: A Commentary*, supra note 22, at 805 ("Consequently, lawful self-defence is restricted to the repulse of an armed attack and must not entail retaliatory or punitive actions.").
125. Recent state practice on this may be seen in the Iraq-Kuwait conflict of 1990-91 (although in that instance, claims of self-defense were mixed with Chapter VII authority) and the Ethiopia-Eritrea conflict of 1998-2001.
126. See *Dinstein*, supra note 30, at 194-203 ("To be defensive, and therefore lawful, armed reprisals must be future oriented, and not limited to a desire to punish past transgressions.").

127. See Oscar Schachter, The Right of States to Use Armed Force, 82 *Mich. L. Rev.* 1620, 1638 (1984) ("Thus, 'defensive retaliation' may be justified when a state has good reason to expect a series of attacks from the same source and such retaliation serves as a deterrent or protective action.").
128. See Bothe, supra note 51, at 235 (explaining that "legality of anticipatory self-defence" is not pertinent to analyses of armed attacks).
129. See Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 119 (June 27) (considering whether United States acted in self-defense with regard to its military activities in Nicaragua).
130. See Concerning Oil Platforms (Islamic Republic of Iran v. U.S.), 2003 I.C.J. 161, 195 (Nov. 6) ("The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence…").
131. See Sean D. Murphy, Terrorism and the Concept of Armed Attack in Article 51 of the U.N. Charter, 43 *Harv. J. Int'l L.* 41, 47, 50-51 (2002) (arguing that September 11th attack on United States was "armed attack" by comparing it to Japanese attack on Pearl Harbor and explaining that United States had authority, under Article 51, to respond in self-defense). F-28
132. See id. (discussing support for theory that United States had been attacked in September 2001, thus justifying its response in self-defense).
133. See Preempting Terrorism, supra note 69, at 26 (discussing argument that United States' military action in Afghanistan in 2001 was not prompted by armed attack and was, instead, preemptive strike).
134. See *Gerhard L. Weinberg, A World at Arms: A Global History of World War II 3*29, 331 (Cambridge University Press 1994) (discussing growth of United States' forces as it prepared to attack Japan and other related history).
135. See *Dinstein*, supra note 30, at 201 (noting bombing in Berlin that killed two American servicemen); see also 1986: US Launches Air Strikes on Libya, (Apr. 15, 1986), at http://news.bbc.co.uk/onthisday/hi/dates/stories/april/15/newsid_3975000/397545 5.stm (last visited Mar. 15, 2005) (discussing alleged details of Berlin night club bombing, as noted by President Reagan).
136. See *Dinstein*, supra note 30, at 201 (discussing United States' 1986 attacks on Libya in response to Libyan attacks, including Berlin bombing).
137. See, e.g., *Henkin*, supra note 29, at 154-56 (explaining differing views on definition of self defense, as some lawyers argue that traditional self-defense is "in response to armed attack" and is restricted to necessity and proportionality, whereas others do not require acts in self-defense to be in response to armed attacks, arguing that they can "be invoked also to defend other vital interests"); see also, e.g., Yoo, supra note 61, at 573 ("In the past two decades, the United States has used military force in anticipatory self-defense against Libya, Panama, Iraq, Afghanistan, and the Sudan.").
138. See *Sean D. Murphy, United States Practice in International Law, Vol. I: 1999-2001* 392-94 (2002) (citing President Clinton's address on March 24, 1999, in which he justified NATO's attacks on FRY, Serbia and Montenegro as "act to protect thousands of innocent people in Kosovo from a mounting military offensive" and "to prevent a wider war, to defuse a powder keg at the heart of Europe that has exploded twice before in this century with catastrophic results"). F-29
139. See Jonathan I. Charney, Anticipatory Humanitarian Intervention in Kosovo, 93 *Am. J. Int'l L.* 834 (1999) (noting that Kosovo intervention occurred after United Nations "was unable to act effectively in Rwanda and Bosnia").
140. See, e.g., *Gray* 2d ed., supra note 35, at 129-33, 181-84 (expressing view that self-defensive actions are unlawful).

141. See *Limits of Law*, supra note 69, at 58, 79-80 (indicating that international lawyers analyze actions of individual states to determine "international reaction" of all states, collectively).
142. See id. at 49-51, 58 (suggesting that international law provides limited guidance and that international lawyers, "[f]aced more often than not with a dearth of data... continue to infer community intent from a handful of its member…").
143. See, e.g., Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 9 (Mar. 3) (looking to practice of Security Council and General Assembly when interpreting U.N. Charter provisions on admission of states to United Nations); see also 1983 U.N. Jurid. Y.B. 179, U.N. Doc. ST/LEG/SER.C/21 (highlighting UN Security Council practice for purpose of interpreting Rules 13 and 15 of UN Security Council provisional rules of procedure); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 22 (June 21) (using such practice to interpret voting requirements of UN Charter article 27(3)).
144. For an argument that the international legal order is built upon accommodations to the "Great Powers," see *Gerry Simpson, Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order 52* (2004) (explaining that "legislative equality is affected by distinctions existing between different classes of state on the basis of their influence of power" and noting that "[t]he Great Powers possess constitutional privileges within international organizations or dominate the law-making process at international conferences"). Professor Finnemore writes: "Decision makers in strong states with the capacity for extensive military intervention have a much greater impact on changes in these rules than other people do, and, through the several centuries examined here, those states are overwhelmingly Western ones that become increasingly liberal, democratic, and capitalistic over time." *Finnemore*, supra note 88, at 18.
145. Michael Byers raises this possibility without himself adopting whether such a methodology is appropriate. See Michael Byers, Book Review, 97 *Am. J. Int'l L.* 721, 722-23 (2003) ("One could argue that the practice of the Council is the delegated practice of all the members of the United Nations…").
146. See id. at 723 (emphasizing significant influence of Security Council's permanent members); but see Thomas H. Lee, International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today, 67 *L. & Contemp. Prob.* 147 (2004) (arguing in favor of maintaining the principle of sovereign equality).
147. See *Dinstein*, supra note 30 at 167 (suggesting that self-defense in response to armed attacks is more favored than preemptive self-defense).
148. *See International Incidents: The Law that Counts in World Politics 23* (W. Michael Reisman et al., eds. 1988) ("Incidents may serve as a type of 'metalaw,' providing normative guidelines for decision makers in the international system in those vast deserts in which case law is sparse.").
149. See id. ("A genre whose practitioners continue to update and correct the expression of the code of international law is required. If it is established …it can ultimately yield an abundant literature of international appraisal… more accurate in expressing international normative expectations.").
150. See *Aust*, supra note 74, at 194 (citing to U.S.-France Air Services Arbitration, 54 I.L.R. 303 (1963)).
151. The basic rule emphasizing constancy and repetition was articulated by the ICJ in Asylum (Colombia v. Peru), 1950 I.C.J. 266, 267-77 (Nov. 20).
152. Pursuit of this analysis would need to confront the divergences of views over what constitutes practice for purposes of customary international law, as exemplified in the debate between Michael Akehurst and Anthony D'Amato. See *Anthony A. D'Amato, The Concept of Custom in International Law* 80-81 F-31

(Cornell University Press 1971) (explaining that "international law is all-pervasive" and indicating that definition of customary practices, under international law, is broad).

153. See *Bill Clinton, My Life* 602-03 (2004) (stating that Clinton Administration considered taking military action against North Korea until North Korea changed its policy and agreed to start talks with United States in Geneva).

154. See BBC News World Ed., Japan Threatens Force Against N. Korea, (Feb. 14, 2003), at http://news.bbc.co.uk/2/hi/asia-pacific/2757923.stm (describing Japan's warning to conduct preemptive military action against North Korea, in response to Pyongyang's nuclear capabilities).

155. See generally Treaty on the Non-proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter Nuclear Non-Proliferation Treaty] (calling upon states to work toward nuclear disarmament and to share nuclear technology for peaceful purposes, but preserving right of five states to possess nuclear weapons: China, France, Russia, United Kingdom and United States). Certain states with nuclear weapons capability--India, Israel, North Korea and Pakistan--either have not joined or have withdrawn from this treaty. See id. (excluding India, Israel, North Korea and Pakistan from Treaty on Non-Proliferation of Nuclear Weapons).

156. See generally Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature Jan. 13, 1993, *S. Treaty Doc. No.* 103-21 (1993), 1974 U.N.T.S. 317 [hereinafter Chemical Weapons Convention] (forbidding parties from "develop[ing], produc[ing], otherwise acquir[ing], stockpil[ing] or retain[ing] chemical weapons, or tranfer[ing], directly or indirectly, chemical weapons to anyone" and requiring all parties to destroy their chemical weapons within ten years after convention's entry into force, which occurred in 1997).

157. See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, opened for signature Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter Biological Weapons Convention] (banning development, production, stockpiling or acquisition of biological agents or toxins "of types and in quantities that have no justification for prophylactic, protective, and other F-32 peaceful purposes").

158. See, e.g., Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, done June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Geneva Protocol] (banning use in war of "asphyxiating, poisonous or other gases," and "bacteriological methods of warfare").

159. See *Brownlie*, supra note 21, at 276 (citing First Report of the United Nations Atomic Energy Commission which states violation of treaty may be so grave so as to rise to right of self-defense under Article 51); *Jessup*, supra note 28, at 167 (quoting from First Report of Atomic Energy Commission); see also Quincy Wright, The Prevention of Aggression, 50 *Am. J. Int'l L.* 514, 529 (1956) (citing to similar IAEA report in 1950s).

160. See *Jessup*, supra note 28, at 166-67 (discussing United States' view on controlling atomic warfare).

161. See Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), opened for signature Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (providing appropriate measures among contracting States for punishing persons who unlawfully intimidate, seize or exercise control of aircraft while on board).

162. See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), opened for signature Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 (providing penalties among contracting States for persons who commit sabotage on board aircraft).

163. See International Convention Against the Taking of Hostages, adopted Dec. 17, 1979, T.I.A.S. 11,081, 1316 U.N.T.S. 205 (providing for punishment of individuals who commit acts of hostage taking).

164. See Convention on Offences and Certain Other Acts Committed on Board F-33 Aircraft, done Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (providing measures of dealing with person committing violent acts on board aircraft).
165. See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (providing for State parties to Convention to make crimes against diplomatic agents and other internationally protected persons punishable according to their grave nature).
166. See International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR, 52nd Sess., U.N. Doc. A/RES/52/164 (1997) (providing that parties to Convention assign appropriate penalties for terrorist offenses).
167. See International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/109 (1999) (discussing measures for punishing individuals involved in financing terrorism).
168. See, e.g., International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR, 52nd Sess., U.N. Doc. A/RES/52/164 (1997) (mandating that attempt to commit terrorist acts violates resolution as if terrorist act had been successful).
169. S.C. Res. 1377, U.N. SCOR, 56th Sess., 4413th mtg. at 2, U.N. Doc. S/RES/1377 (2001); see also, e.g., S.C. Res. 1566, U.N. SCOR, 59th Sess., 5053rd mtg. at para. 1, U.N. Doc. S/RES/1566 (2004) (referring to terrorism as serious threat to peace and security); S.C. Res. 1070, U.N. SCOR, 51st Sess., 3690th mtg. at 2, U.N. Doc. S/RES/1070 (1996) (stating suppressing international terrorism is necessary to maintain international peace and security); S.C. Res. 731, U.N. SCOR, 47th Sess., 3033rd mtg., U.N. Doc. S/RES/731 (1992) (referring to acts of international terrorism that threaten international peace and security).
170. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. at 1, U.N. Doc. S/RES/1373 (2001). F-34
171. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg. U.N. Doc. S/RES/1368 (2001) (emphasis added). 173. See **Finnemore**, supra note 88, at 73-84 (discussing humanitarian intervention and its changing over time).
172. See, e.g., Joint Resolution Authorizing Force Against Iraq, supra note 9, at 1500 (stating that President has Constitutional authority to prevent and deter acts of terrorism).
173. See, e.g., *Cassese, International Law*, supra note 34, at 309-10 (stating that all members of Security Council except Israel disagreed with Israeli justification for attack on Iraqi nuclear reactor).
174. See VCLT, supra note 72, at art. 31 (discussing supplementary means of interpretation, including preparatory work, in treaty interpretation).
175. For a discussion of the disagreement between different schools of thought relating to preemptive self-defense, see supra notes 72-100 and accompanying text.
176. For a discussion of the use of the negotiating history of the Charter, see supra note 21 and accompanying text. For an example of how a particular school, the strict constructionists, uses the negotiating history of the charter to further its cause, see supra note 80 and accompanying text.
177. See, e.g., *Brownlie*, supra note 21, at 275-76 (discussing how travaux préparatoires suggests presumption against self-defense in Article 51).
178. See, e.g., *Brierly*, supra note 43, at 417-18 (mentioning travaux préparatoires suggests Article 51 supports recourse to self-defense).
179. See generally, e.g., Timothy Kearley, Regulation of Preventive and F-35 Preemptive Force in the United Nations Charter: A Search for Original Intent, 3 *Wyoming L. Rev.* 663 (2003) (discussing drafting history

of Charter to determine whether drafters intended to permit state to use preventive or preemptive force in self defense).

180. See, e.g., Certain Expenses of the United Nations, 1962 I.C.J. 151, 185 (July 20) (separate opinion of Judge Spender) (stating terms of Charter itself in context should be looked at for interpreting text rather than travaux préparatoires).
181. See *Recourse to Force*, supra note 49, at 50 (recounting exchanges between Harold Stassen and members of U.S. delegation, including State Department Legal Adviser Green Hackworth, in which Stassen made clear that actual armed attack must occur before resort to self-defense); Kearley, supra note 184, at 669 (concluding that drafters did not intend to preclude self-defense against imminent attack, but intended to preclude self-defense against attack believed to be inevitable, but not imminent).
182. See Kearley, supra note 184, at 680-81 (stating that right to self-defense that exists in Article 51 is due to Latin American nations' demands for collective security arrangements).
183. See id. at 701-03 (noting Eden's support of French proposal, rather than U.S. proposal, that triggers right to self defense only when there is "armed attack").
184. See id. at 702 (discussing Eden's fear of possible attack by using hypothetical example of "Soviet instigated attack by Bulgaria on Turkey," which would lead Great Britain to want to preemptively attack enemy to protect itself).
185. See id. at 702-714 (providing extensive discussion of negotiating language of Article 51, ending with final agreement including phrase "armed attack" proposed by United States).
186. For a summary of this encounter, see *Stephen C. Schlesinger, Act of Creation: The Founding of the United Nations* (2003). Stettinius was likely referring to Germany's attack on Poland in 1939 and on Norway in 1940, both of which were asserted by German officials to be anticipatory self-defense and both of which were found to be aggression by the International Military Tribunal at Nuremberg. See International Military Tribunal (Nuremberg), Judgement and Sentences, 41 *Am. J. Int'l L.* 172, 205 (1947) (stating Germany attacked Norway F-36 to prevent Allied invasion). He may also have had in mind Japan's attack on Manchuria in 1931, which Japan asserted was a necessary act of self-defense.
187. *Finnemore*, supra note 88, at 1.
188. See id. at 19 ("Waging wars for the glory of one's country is no longer honored or even respectable in contemporary politics. Force is viewed as legitimate only as a last resort, and only for defensive or humanitarian purposes.").
189. For a discussion on the different views of the various schools on preemptive self-defense, see supra notes 17-69 and accompanying text.
190. For a discussion of the debate between four different schools of thought, see supra notes 70-100 and accompanying text.
191. For a discussion of the lack of methodological approach to determining legality of preemptive self-defense, see supra notes 99-100 and accompanying text.
192. For a discussion of the problem of lawyers failing to explain the legal theories they are using with respect to preemptive self-defense, see supra notes 150-177 and accompanying text.
193. For a discussion of the problems created by international lawyers not explaining why one method of analysis is superior to another, see supra notes 70-71 and accompanying text.
194. For a discussion of distinct problems of law surrounding preemptive self-defense, see supra notes 72-190 and accompanying text.

APPENDIX 4

SPREADSHEET OF PROSECUTORIAL CHALLENGES IN NUCLEAR TRAFFICKING CASES

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APPENDIX 4: SPREADSHEET OF PROSECUTORIAL CHALLENGES IN NUCLEAR TRAFFICKING CASES

The following spreadsheet presents graphically the specific legal challenges and political obstacles that have frequently contributed to the collapse of nuclear trafficking prosecutions. Included in this spreadsheet are the prosecutions of four nuclear traffickers: Gotthard Lerch (Germany), Abu Siddiqui (United Kingdom), Henk Slebos (The Netherlands) and Gerhard Wisser (South Africa). These cases were selected because of the availability of detailed declassified information about the prosecutions and because they are representative of the possible outcomes of prosecution attempts. Lerch was tried four times and Slebos three times before a conviction could be secured. Abu Siddiqui was convicted on the first attempt but received a relatively light sentence. Wisser's prosecution was a resounding success not only because of the quality of South African nonproliferation Statutes, but also because all evidence and witnesses were located within South Africa. A detailed explanation of the individual cases follows.

X Indicates prosecutors encountered a problem in the relevant area.

- Indicates prosecutors successfully overcame problems in the relevant area that had appeared in previous prosecution attempts.

	Int'l Legal Assistance	Counterproliferation Statues	Extradition	Classified Evidence	Court Jurisdiction	Testimony and Witnesses	Ne bis in idem Restrictions	Sentencing	Minor Crimes	Scientific Expertise	
Gotthard Lerch 1990	X	X									
Gotthard Lerch-1992	X	X					X				
Gotthard Lerch-2006	X	X	X	X	X	X			X		
Gotthard Lerch 2008	-	-	X	-	-	X	-	X			
Abu Siddiqui 2001	X	X									
Henk Slebos 1979	X										
Henk Slebos 1983				X							
Henk Slebos 1999/2001										X	
Henk Slebos 2005		X		X	X					X	

PROSECUTION CHALLENGES: SPREADSHEET EXPLANATION

GOTTHARD LERCH (1990)

Charge: Supplying vacuum feed-and-withdrawal centrifuge components for Pakistan's nascent nuclear weapons programs.

Relevant Law: Germany's general export control act (Ausfuhrkontrollgesetz)

International Legal Assistance	German prosecutors were never able to bring a case against Lerch for misappropriating Urenco blueprints because Swiss authorities refused to cooperate in an investigation, on the grounds that the statute of limitations had expired.
Nonproliferation Statutes	No statute specifically regulating the spread of nuclear materials existed in German law at the time. As a result prosecutors sought to bring charges on standard export control violations, statutes that allowed them little time and investigatory authority.

GOTTHARD LERCH (1992)

Charge: Same as in 1990

Relevant Law: War Weapons Control Act (Kriegswaffenkontrollgesetz)

International Legal Assistance	Swiss officials refused to give German investigators access to critical incriminating documents.
Nonproliferation Statutes	Still using outdated general export and arms control laws with limited investigatory authority.
Double Jeopardy Restrictions	Lack of international cooperation and effective criminal statutes resulted in acquittal due to lack of incriminating evidence and double jeopardy restrictions therefore prevented a retrial.

GOTTHARD LERCH (2006)

Charge: Providing blueprints for advanced-technology gas centrifuges to the A.Q. Khan network for use in the construction of a uranium enrichment plant for Libya in South Africa. Lerch also allegedly coordinated the delivery of autoclaves used in the sublimation of uranium hexafluoride gas.

Relevant Law: Violations of Germany's Foreign Trade Act (Außenwirtschaftgesetz) and War Weapons Control Act (Kriegswaffenkontrollgesetz), Charges of Treason dismissed pre-trial.

International Legal Assistance	Requests for legal assistance and evidence from Switzerland, South Africa, and Liechtenstein went largely unfulfilled.
Nonproliferation Statutes	Revision made to War Weapons Control Law, which specifically addressed the threat of WMD proliferation and gave law enforcement increased authority when investigating suspected WMD materiel and technology traffickers.
Extradition	Extradition delayed, German-Swiss extradition treaty required dropping treason charges, Swiss demanded return of Urs Tinner in exchange for Lerch.
Classified Evidence	US, British, and German intelligence agencies withheld important documents due to information security concerns; some intelligence reports ruled inadmissible due to speculative nature.
Court Jurisdiction	Treason charges dropped thus trial held at district, not superior court level. Mannheim chosen b/c experience with export control cases. Defense argued should be held at site of extradition, Konstanz.
Testimony and Witnesses	Urs Tinner, Khan network operative turned CIA informant would have been a key witness in Lerch trial, returned to Switzerland. Testimony from Tahir in Malaysia not admitted because not given to court directly.
Sentencing	Defense argued that administrative delays meant Lerch had already served nearly as much time in pre-trial detention as the maximum sentence were he convicted, and thus the trial should be dismissed.

GOTTHARD LERCH (2008): PROSECUTOR=WOLFGANG SIGMUND, JUDGE=JÜRGEN NIEMEYER, DEFENSE ATTORNEY=GOTTFRIED REIMS

Charge: Same as 2006

Relevant Law: Same as 2006

Outcome: Sentenced to 66 months incarceration on November 17, 2008. Lerch will serve not time in prison because his lawyers successfully argued he had already served his time in pre-trial detention.

International Legal Assistance	Switzerland and Liechtenstein finally provided business documents and financial records to the German court and Libya also agreed to provide evidence to assist prosecutors.

Extradition	Swiss authorities cooperated in a timely fashion with the German request for extradition, once again insisting that political charges, like treason, be dropped and only criminal offenses tried.
Classified Evidence	Secrecy concerns for classified evidence continue to be a problem for prosecutors, however, intelligence agencies including the CIA and MI6 provided sanitized reports for use in court that did not reveal their sources and methods of intelligence collection.
Court Jurisdiction/ Nonproliferation Statutes	Export control laws rewritten to allow Lerch to stand trial in a higher court, defense lawyers argued that the case started in Mannheim and that court must render verdict. Court overturned the challenge and permitted the trial to be held at the appellate level.
Testimony and Witnesses	German court officials traveled abroad to gather testimony from other Khan network operatives.
Prosecution for Minor Crimes	Attempts to indict on charges of money laundering hindered by Swiss bank secrecy laws

ABU SIDDIQUI (2001)

Charge: Exporting proliferation sensitive goods to Pakistan over the course of a decade for use in its nascent nuclear weapons program.

Relevant Law: General Export Control Statutes

Outcome: 12 month suspended sentence

International Legal Assistance	Authorities in Dubai hesitated for over a year before granting British authorities permission to conduct an investigation to determine whether the goods Siddiqui exported ended up in Pakistan. Later Dubai refused to release critical documents to British prosecutors for use in trial, so Siddiqui could only be convicted for failure to obtain an export license.
Nonproliferation Statutes	Britain's export control statutes at the time did not prescribe stricter surveillance and licensing procedures for dual-use goods destined for proliferation sensitive countries and transship points.

HENK SLEBOS (1979)

Charge: Exporting centrifuge rotors to Pakistan for use in the development of nuclear weapons

Relevant Law: Export Control Act

International Legal Assistance	Official investigation launched against Slebos in the Netherlands, but dismissed for lack of evidence before coming to trial due to investigator's inability to obtain critical evidence located abroad.

HENK SLEBOS (1983)

Charge: Repeated attempts to export an oscilloscope to Pakistan without a proper license.

Outcome: Convicted of violations of Dutch export control laws, sentenced to 1 year in prison, later suspended on appeal because prosecutors could not prove the oscilloscope was destined for nuclear weapons development.

Classified Evidence	Though the initial prosecution was successful, evidence linking Slebos to the Pakistani nuclear program could only be found in classified intelligence reports, which were not used at trial.

HENK SLEBOS (1999-2001)

Charge: Export of centrifuge components to Pakistan.

Scientific Expertise	Slebos exported critical centrifuge components in several small shipments to make them appear innocuous. Customs agents grew suspicious, but higher authorities dismissed their investigation because, taken separately, the shipments did not present a convincing case that Slebos was involved in a nuclear weapons program.

HENK SLEBOS (2005) PROSECUTOR=JULIA C. HORZINEK

Charge: Shipping to Pakistan restricted dual-use items including 6 MKS Baratron Absolute Capacitance Manometers between 24 and 29 August 1999, 9,000 Viton 70 type O-Rings to between 21 August 2001 and 1 August 2002, 20 kilograms of Triethanolamine between 24 July and 15 October 2002, and 104 pieces of graphite between 1 Januar7 and 3 July 1999.

Court: Rechtbank Alkmaar, Meervoudige Economische Kamer

Relevant Laws: European Union Council Resolution 94/942/GBVB; "Catch-All" Export Control Regulation of 14 August 2001; Export Control Regulations of 12 December 2001 and 8 January 2002; European Union Council Order 1334 of 2000

Outcome: Sentenced to 18 months incarceration, 12 months suspended, and a 100,000 Euro fine.

Nonproliferation Statutes	The court dismissed further charges against Slebos, including the export of ball bearings to Pakistan on the grounds that the relevant export control laws had not entered into force at the time of the attempted export. Dutch law requires Ministry of Economic Affairs Regulations to be announced to affected businesses. Since the Ministry did not sent a notification to Slebos by registered mail, he was able to claim he was unaware of the new regulations. The sentence pronounced against Slebos was weakened since prosecutors could only prove the exported items were shipped to a restricted country, Pakistan, not that they would actually be used for nuclear weapons purposes. Inability to prove intent is a frequent problem in export control cases.
Classified Information	The entire investigation into Slebos' illicit activities came close to being ruled inadmissible for improper conduct. Since Dutch intelligence agents were present during the search of his dwelling and office to provide advice and background information that helped Dutch law enforcement officers gather critical evidence against Slebos, his defense attorneys argued the investigation had been improperly tampered with by the political branch of government. The Dutch Ministry of Justice also presented certain classified evidence to court judges before the prosecution without providing this information to the defendant, for national security reasons. Defense attorneys argued this was an improper submission of evidence and violated the defendant's rights to view evidence presented against him.
Court Jurisdiction	Defense attorneys alleged judges had illicit contact with prosecutors before the opening of the case and were under pressure by the Dutch government to render a guilty verdict given the high profile international nature of the case and that the reputation of Dutch commitment to nonproliferation depended on the outcome of the case. At least one judge recused himself on these grounds.
Scientific Expertise	Slebos' illicit activities were discovered by chance years after he had begun exporting restricted goods. His case highlights that customs inspectors often do not know what to look for to find proliferation sensitive goods and do not monitor more closely the actions of individuals and corporations with a history of illegal exports. In addition, law enforcement officers conducting the investigation of Slebos' residence and business relied on advice from intelligence agents to determine what to look for. This was deemed an illegal assistance of law enforcement and highlights that specially trained investigative units should be formed to conduct investigations in nuclear trafficking cases.

MOHSEN V. (2008-9)

Charge: Illegal export of two high-speed cameras, several radiation-proof sensors often used in nuclear weapons development, and high-power night vision goggles to Iran between May and November 2007, for which the accused is claimed to have received at least 87,000 Euros in compensation.

Relevant Laws: German War Wepons Control Act (Kriegswaffenkontrollgesetz), German Foreign Trade Act (Außenwirtschaftgesetz), and UN weapons sanctions against Iran.

Responsible Court: Fifth Chamber of the Frankfurt High Court 5. Strafsenat des Oberlandesgerichts Frankfurt am Main.)

Initial Verdict Rendered: 6 August 2008

Ruling: The court declined to hear the case on "procedural and factual grounds." The high court determined that there was insufficient evidence to prove the defendant was aware the likely result of his actions was to support uranium enrichment and WMD-development capabilities in Iran and that his actions were not sufficiently detrimental to the international relations of the Federal Republic of Germany to merit proceedings in a high court under the relevant recently updated provisions of the Foreign Trade Act (AWG) and War Weapons Control Act (KWKG), which were modified as a result of the most recent Lerch case. Federal prosecutors appealed the high court's decision to one of Germany's highest federal courts on questions of interpretation of the relevant statutes in February 2009.

Appeal Ruling: March 26, 2009

Responsible Court: Federal Court of Appeals (Bundesgerichtshof)

Relevant Laws: German War Wepons Control Act (Kriegswaffenkontrollgesetz), German Foreign Trade Act (Außenwirtschaftgesetz), and UN weapons sanctions against Iran.

Ruling: German Federal Prosecutors moved to pursue only charges related to the export of night vision goggles, for which they had the most evidence. The court, however, found that enough evidence existed that Iran was engaged in nuclear weapons development activities and that the defendant, through his telephone conversations and visits with Iranian officials should have know the purposes for which the Iranian government sought his assistance in procuring

proliferation sensitive goods. The court found evidence was sufficient to continue prosecution not only on the basis of illegal export of night vision goggles but also high-speed cameras. The charges of export of radiation sensors (Geiger counters) were dropped. The court ordered the proceedings opened in the District Court of Frankfurt, since the relevant provisions of the Foreign Trade and War Weapons Control Acts, that the activity concerned significantly impacted upon the foreign relations of Germany, were not met and therefore the High Court of Frankfurt could not exercise original jurisdiction over the alleged offenses.

International Legal Assistance	The United States provided significant assistance to the prosecution in the form of intelligence reports concerning Iran's nuclear activities. In addition, representatives of the IAEA made several on-the-record statements about the proliferation sensitive nature of the goods the defendant had exported and how they might be used in the context of the Iranian nuclear weapons program.
Classified Evidence	The United States, the IAEA, and the German Central Intelligence agency provided classified information about Iranian nuclear weapons development activities. This case is a landmark in German nonproliferation prosecutions because the classified intelligence estimates were accepted as evidence by the court and were not discredited as hearsay or insufficiently convincing. The court in the present case established the standard that so long as intelligence reports are based to some degree on primary source information and not contradicted by other reports from other sources, they may be admitted as evidence.
Nonproliferation Statutes	In the Lerch prosecution, obtaining a significant sentence was difficult because the court was not convinced Lerch's intent was to contribute to the proliferation of nuclear weapons as provided in Germany's War Weapons Control Act. In the current proceeding, however, the court accepted classified reports as well as records of the defendant's contacts with Iranian officials as sufficient to establish that he should have known his activities would contribute to the proliferation of nuclear weapons. The court also made a ruling about the interpretation of a provision in the Foreign Trade and War Weapons Control Acts that allows cases to be held in higher courts, described below.
Court Jurisdiction	The court determined that the standard for significant damage to the foreign relations of Germany provided as grounds in the Foreign Trade and War Weapons Control Acts to hold proceedings in a superior court were different in each act. The War Weapons Control Act requires demonstration that the

	defendants actions prevented Germany from fulfilling its international legal obligations and as a result brought criticism from the international community. The Foreign Trade Act simply requires the defendant to have engaged in activity, which by its nature may harm Germany's reputation as an upstanding member of the international community. The court, however, found that the defendant had engaged in neither type of activity and therefore, despite prosecutors' attempts to conduct proceedings in a high court, remanded the case to the District Court of Frankfurt.

Proceedings should be resumed in the District Court of Frankfurt sometime later this year.

GERHARD WISSER (2007)

Charge: Assisting in the A.Q. Khan network's construction of a uranium enrichment facility for Moammar Khaddafi in South Africa by receiving components from abroad, supervising assembly, and coordinating the shipment of the facility to Libya.

Relevant Law: South African Nonproliferation statutes (some of the strictest in the world)

Sentence: 18 years imprisonment and $3 million in fines

Nonproliferation Statutes	South Africa's strict nonproliferation statutes made Wisser's actions a serious offense to be tried in a superior court
International Legal Assistance	Most relevant evidence was located within South African' borders, but Libya's willingness to cooperate ensured the success of the trial
Extradition	Extradition was necessary because the defendent was located in South Africa at the time of trial
Classified Evidence	The court ruled to allow the protected disclosure of classified evidence at trial.
Testimony and Witnesses	The key witness, Daniel Geiges, was under the territorial jurisdiction of South Africa and was offered a reduced sentence for his own offenses in exchange for his testimony against Wisser.

The ability to hold proceedings *in camera* and make protected disclosures of classified information contributed to the success of the prosecution. However, for the same reason, the details concerning the proceedings have not yet been released and a closer analysis of the prosecution is therefore impossible.

LIST OF RECENT US AND INTERNATIONAL NUCLEAR PROLIFERATION PROSECUTIONS

This list includes basic information about recent nuclear trafficking prosecutions in the US and abroad about which few details have yet been made public. It is intended to demonstrate how frequently nuclear smuggling occurs and how great a threat it truly is. Data for this list was compiled from the Nuclear Threat Initiative, the National Journal Group Global Security Newswire, the University of Georgia Center for International Trade and Security, the Arms Control Association, the New York Times, and the Washington Post, and the Department of Justice Office of the National Export Control Coordinator Public Factsheet.

1. Mohammad Reza Alavi (USA)

   - ❒ Arrest: 8 April 2007
   - ❒ Trial Date: 12 April 2007, pled guilty on 26 June 2008
   - ❒ Charge: Illegally accessing classified nuclear power plant schematics and operator training material online while in Iran.
   - ❒ Relevant Law: Illegal access of government information, Export Control and Iran Trade Embargo violation charges dropped.
   - ❒ Sentence: Will be determined in a hearing scheduled for September 29, 2008

2. Selim Alguadis, Zubeyir Baybars Cayci, Ertugrul Sonmez (Turkey)

   - ❒ Arrest: Under investigation in Turkey since 2005, no arrest yet made
   - ❒ Charge: Supplying electrical voltage regulators to Libya, supposedly for use in the uranium enrichment facility under construction for Khadaffi in South Africa by the A.Q. Khan Network.
   - ❒ Relevant Law: General Export Control Statutes

3. Noshir Gowadia (USA)

   - ❒ Arrest: 25 October 2005
   - ❒ Trial Date: 10 July 2007, postponed until October 2008

- ❒ Charge: The Northrop Grumman engineer is charged with having divulged secrets regarding B-2 bomber stealth technology to China to make its aircraft and missiles less detectable
- ❒ Relevant Law: Arms Export Control Act

4. Hans-Josef H. (Germany)

- ❒ Arrest and Initial Hearing: 20 June 2008
- ❒ Grounds for Arrest: Attempting to export missile technology and components to Iran, a transaction the German government believes was averted by the suspect's timely arrest.
- ❒ Charge: Exporting nearly 15 tons of graphite to Iran through a Turkish front company between 2005 and 2007.
- ❒ Relevant Law: Foreign Trade Act (Außenwirtschaftgesetz)
- ❒ Responsible Court: State Court of Koblenz (Landgericht Koblenz)
- ❒ Verdict Rendered: 11 May 2009
- ❒ Sentence: 6 years incarceration
- ❒ Ruling: The court found the defendant guilty of repeatedly exporting graphite to Iran in violation of the Foreign Trade Act.

5. MTS Systems Corp (USA)

- ❒ Convicted: March 12, 2008
- ❒ Charge: Submitting false export license applications to the Department of Commerce in connection with the proposed shipment of seismic testing equipment with nuclear applications to an entity in India. MTS knew the end-user in India would likely use the seismic testing equipment for nuclear purposes, but, in its export applications to the Department of Commerce, MTS falsely certified that the equipment would be used only for non-nuclear purposes.
- ❒ Relevant Law: International Emergency Economic Powers Act (IEEPA)

6. Hiroshi Nakano (Japan)

- ❒ Arrest: Under questioning, no official arrest yet made

- ❒ Charge: Exporting vacuum pumps for uranium isotope separation via Taiwan to North Korea in 2003 without an export permit.
- ❒ Relevant Law: General Export Control Statutes

7. Samuel Shangteh Peng (USA)

- ❒ Convicted: July 30, 2007
- ❒ Charge: Illegally exporting vibration amplifiers, cable assemblies and vibration processor units in 1999 and 2000 from the U.S. to Hindustan Aeronautics Limited, Engine Division, in India. In 1998, the U.S. government designated this facility in India as an end-user of concern for proliferation reasons.
- ❒ Relevant Law: International Emergency Economic Powers Act (IEEPA)

8. Proclad International Pipelines, Ltd. (USA)

- ❒ Convicted: March 14, 2008
- ❒ Charge: Attempting to export to Iran, without an export license, specialty alloy pipes that can be used in uranium enrichment.
- ❒ Relevant Law: Iran Embargo

9. Ahmad R. (Germany)

- ❒ Arrest and Initial Hearing: 15 January 2008
- ❒ Charge: Attempted export of technical components critical to nuclear weapons development to Iran.
- ❒ Relevant Law: Foreign Trade Act (Außenwirtschaftgesetz)

10. Juan Sevilla (USA)

- ❒ Convicted: November 30, 2006
- ❒ Charge: Illegally exporting machinery and software used to measure the tensile strength of steel to Iran. The technology is listed on the Nuclear Supplier's Group "Watch List" as a commodity that can contribute to nuclear activities of concern.

- ❒ Relevant Law: Iran Embargo

11. SparesGlobal, Inc. (USA)

- ❒ Convicted: October 4, 2007
- ❒ Charge: exported to a trading company in the UAE restricted graphite products that can be used in nuclear reactors and in the nose cones of ballistic missiles. The graphite products were routed to Pakistan. After the shipment, the company attempted to mislead federal investigators when questioned about the shipment and related documents
- ❒ Relevant Law: International Emergency Economic Powers Act (IEEPA)

12. Friedrich Tinner (Switzerland)

- ❒ Arrest Date: October 2004
- ❒ Trial Date: Released from custody, a prosecution may or may not occur
- ❒ Charges: Misappropriation of gas centrifuge blueprints, supplying Pakistan improved bomb detonation devices
- ❒ Relevant Law: Not yet determined

13. Marco and Urs Tinner (Switzerland)

- ❒ Arrest Date: October 2004, Marco released and re-arrested in November 2005
- ❒ Trial Date: In administrative detention awaiting trial, date not yet set
- ❒ Charges: Misappropriation of gas centrifuge blueprints, construction oversight and materiel acquisition for the Khan network's uranium enrichment assembly destined for Libya.
- ❒ Relevant Law: Not yet determined

14. Mohsen V. (Germany)

- ❒ Arrest and Initial Hearing: 27 November 2007
- ❒ Trial Date: 17 May 2008

- ❒ Charges: Illegal export of two high-speed cameras, several radiation-proof sensors often used in nuclear weapons development, and high-power night vision goggles to Iran between May and November 2007, for which the accused is claimed to have received at least 87,000 Euros in compensation.
- ❒ Relevant Laws: German War Wepons Control Act (Kriegswaffenkontrollgesetz), German Foreign Trade Act (Außenwirtschaftgesetz), and UN weapons sanctions against Iran.
- ❒ Responsible Court: Fifth Chamber of the Frankfurt High Court (5. Strafsenat des Oberlandesgerichts Frankfurt am Main.)
- ❒ Initial Verdict Rendered: 6 August 2008
- ❒ Ruling: The court declined to hear the case on "procedural and factual grounds." The high court determined that there was insufficient evidence to prove the defendant was aware the likely result of his actions was to support uranium enrichment and WMD-development capabilities in Iran and that his actions were not sufficiently detrimental to the international relations of the Federal Republic of Germany to merit proceedings in a high court under the relevant recently updated provisions of the Foreign Trade Act (AWG) and War Weapons Control Act (KWKG), which were modified as a result of the most recent Lerch case. Federal prosecutors appealed the high court's decision to one of Germany's highest federal courts on questions of interpretation of the relevant statutes in February 2009.
- ❒ Appeal Ruling: March 26, 2009
- ❒ Responsible Court: Federal Court of Appeals (Bundesgerichtshof)
- ❒ Relevant Laws: German War Wepons Control Act (Kriegswaffenkontrollgesetz), German Foreign Trade Act (Außenwirtschaftgesetz), and UN weapons sanctions against Iran.
- ❒ Ruling: German Federal Prosecutors moved to pursue only charges related to the export of night vision goggles, for which they had the most evidence. The court, however, found that enough evidence existed that Iran was engaged in nuclear weapons development activities and that the defendant, through his telephone conversations and visits with Iranian officials should have know the purposes for which the Iranian government sought his assistance in procuring proliferation sensitive goods. The court found evidence was sufficient to continue prosecution not only on the basis of illegal

export of night vision goggles but also high-speed cameras. The charges of export of radiation sensors (Geiger counters) were dropped. The court ordered the proceedings opened in the District Court of Frankfurt, since the relevant provisions of the Foreign Trade and War Weapons Control Acts, that the activity concerned significantly impacted upon the foreign relations of Germany, were not met and therefore the High Court of Frankfurt could not exercise original jurisdiction over the alleged offenses.

15. Anor Xojayev (Uzbekistan)

- ❒ Arrest: 17 July 2008
- ❒ Charge: Exporting several tons of tantalum metal in various forms to Iran without an export license.